Supreme Court U.S.
FILED
991521 MAR 15 2000
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No. 99-

IN THE

Supreme Court of the United States

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL and DEWEY BULL TAIL,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the main rule in *Montana v. United States*, 450 U.S. 544 (1981), apply to a reservation accident involving tribal members and occurring at the intersection of a railroad right-of-way and a tribal road under the jurisdiction, dominion and control of the Crow Tribe?

2. Do the Crow Tribal Courts have civil jurisdiction over a wrongful death action brought by tribal members arising out of a railroad's breach of its congressionally mandated obligation to operate its railroad "with due regard for the rights of the Indians"? Pub. L. No. 50-134, § 3, 25 Stat. 660 (1889).

3. When there exist disputed issues of fact concerning the applicability of *Montana's* main rule or the *Montana* exceptions, is the exhaustion of tribal court remedies pursuant to *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), still required?

4. Is tribal consent to state court jurisdiction pursuant to 25 U.S.C. § 1326 mandatory before a tribal plaintiff, excluded from tribal court, may pursue an alternative forum in either state or federal court?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties listed in the caption, the parties to the proceeding below included Crow Tribal Court Special Judge Honorable Ron Arneson, who was voluntarily dismissed in the district court, and Applicant in Intervention The Crow Tribe of Indians which was denied intervention by the district court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding Below	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
A. Tribal Court Proceedings.	4
B. Federal Court Proceedings.	6
Reasons for Granting the Writ	7
I. The Occurrence Of The Accident On A Tribal Road Establishes Tribal Court Jurisdiction Under *Strate*.	7
II. The Right-Of-Way Grant Provides Tribal Court Authority To Enforce Indian Rights.	9

Contents

	Page
III. Jurisdictional Questions Of Fact Pending In Tribal Court Require Application Of The Exhaustion Of Tribal Remedies Doctrine. .	11
IV. Tribal Consent Is Required Before An Alternative State Or Federal Court Forum Exists.	14
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Engelke, 954 P.2d 1106 (Mont. 1998) 15

Angel v. Bullington, 330 U.S. 183 (1947) 15

Burlington Northern Railroad Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991) 9

Burlington Northern Railroad Co. v. Estate of Red Wolf, et al., 139 L. Ed. 2d 5 (1997) 2

Burlington Northern Railroad Co. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997) 5

Guarantee Trust Co. v. York, 326 U.S. 99 (1945) . 15

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 3, 14, 15

Kennerly v. District Court, 400 U.S. 423 (1971) .. 14

Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994) ... 15

Milbank Mutual Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) 14

Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998) 15

Cited Authorities

Page

Montana v. United States, 450 U.S. 544 (1981) ..... i, 6, 7, 13

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) ..... i, 3, 5, 12, 14

Properties Inv. v. Found. For Airborne R., 563 P.2d 307 (Ariz. App. 1977) 7

Strate v. A-1 Contractors, 520 U.S. 438 (1997) .. *passim*

United States v. Soldana, 246 U.S. 530 (1918) 8, 10

Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987) 15

Statutes and Treaties Cited:

Congressional Act of February 12, 1889, 25 Stat. 660 1

Congressional Act, 25 U.S.C. § 1326 ..... i, 2, 14, 15

H.R. Rep. No. 3825, 50th Cong., 2d Sess. (1889) . 10

Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601, *et seq.* 2, 11

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1360(a) 14

Cited Authorities

Page

Other Publications Cited:

Aaron S. Duck, Note, *Indians: Modern Tribal Jurisdiction Over Non-Indian Parties: The Supreme Court Takes Another Bite Out Of Tribal Sovereignty In Strate v. A-1 Contractors*, 51 Okla. L. Rev. 727 (1998) 3, 12

Pub. L. No. 50-134, § 3, 25 Stat. 660 (1889)i, 3, 9, 10

TABLE OF APPENDICES

Page

Appendix A — Order And Amended Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed November 17, 1999 And Amended January 6, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Montana, Billings Division Dated And Filed April 30, 1998 ..... 16a

Appendix C — Order Of The Crow Court Of Appeals In And For The Crow Indian Reservation, Crow Agency, Montana Re Request For Judicial Notice Dated April 20, 1998 And Filed April 22, 1998 ..... 32a

Appendix D — Limited Remand Order And Revised Order Of The Crow Court Of Appeals In And For The Crow Indian Reservation, Crow Agency, Montana Governing Conduct Of Appeal Dated June 17, 1997 ..... 38a

Appendix E — Pub. L. No. 50-134, 25 Stat. 660 (1889) 44a

Appendix F — Relevant Statutes 47a

Appendix G — H.R. Rep. No. 3825, 50th Cong., 2d Sess. (1889) 49a

PETITION FOR A WRIT OF CERTIORARI

The Estates of Red Wolf and Bull Tail ("Red Wolf") Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the Court of Appeals, (Pet. App. 1a-15a), is reported at 1999 WL 1293020. The District Court's Order granting Burlington Northern Railroad Company's ("BN") Motion For Summary Judgment, (Pet. App. 16a-31a), is reported at 23 M.F.R. 263. Also included in Petitioner's Appendix are the Order Re: Request For Judicial Notice (Pet. App. 32a-37a) and the Crow Appeals Court's Limited Remand Order and Revised Order Governing Conduct of Appeal (Pet. App. 38a-43a).

STATEMENT OF JURISDICTION

The Court of Appeals issued its original Opinion on November 17, 1999. Red Wolf filed a timely Petition For Panel Rehearing which was denied on January 6, 2000. (Pet. App. 5a). Accordingly, the Petition for Writ of Certiorari is due no later than April 4, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of the Congressional Act of February 12, 1889, 25 Stat. 660, which mandates that the operation of BN's trains over the subject right-of-way shall be conducted "with due regard for the rights of the Indians", is set forth at

Pet. App. 44a-46a. The text of the Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601, *et seq.* which establishes tribal courts for the purpose of adjudicating disputes affecting Indian rights, is set forth at Pet. App. 47a-48a.

The text of the Congressional Act, 25 U.S.C. § 1326, requiring tribal consent as a prerequisite to the exercise of state court jurisdiction over reservation based claims, is set forth at Pet. App. 48a.

STATEMENT OF THE CASE

This case presents one of the important questions concerning tribal court jurisdiction over non-Indians left unanswered by the Court's recent decision in *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). Despite being directed to consider this case in light of *Strate*,[1] the Ninth Circuit failed to heed *Strate's* clear signal that tribal court jurisdiction continues to exist over accidents involving non-Indians which occur *on tribal roads* within a reservation.[2] The Ninth Circuit's decision, which regarded the tribal road location of the subject accident to be irrelevant to the "jurisdictional calculus", Pet. App. 9a, improperly destroys any remaining vestige of tribal court jurisdiction intended to be left intact by *Strate*.

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1. *See Burlington Northern Railroad Co. v. Estate of Red Wolf, et al.,* 139 L. Ed. 2d 5 (1997) granting BN's Petition for Writ of Certiorari, vacating the Judgment of the Ninth Circuit and remanding to the Ninth Circuit for further consideration in light of *Strate*.

2. In *Strate*, the court left open the question of "the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* 520 U.S. at 442.

This case also differs markedly from *Strate* in that the wrongful death action originating in Crow Tribal Court arose directly out of BN's breach of its obligation, mandated by Congress, to operate its railroad "with due regard for the rights of the Indians".[3] Unlike in *Strate*, therefore, Red Wolf is able to point to statutes authorizing the Crow Tribe to "entertain" railroad accident tort suits of the kind commenced against BN.

Since *Strate*, courts and commentators have expressed concern over the apparent demise of the doctrine of exhaustion of tribal court remedies first pronounced in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).[4] This case presents the opportunity for the court to reinforce the doctrine in cases, such as this, where disputed factual issues pending in tribal court make it far from "plain" that tribal court jurisdiction does not exist.

Finally, the Ninth Circuit's decision which held that Red Wolf has an alternative forum "in either state or federal courts, as appropriate", Pet. App. 13a, conflicts with the court's ruling in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), requiring tribal consent as a prerequisite to state court jurisdiction over reservation based claims. No such tribal consent exists here.

This is the second time this case has come before the Court on a Petition for Writ of Certiorari from the Ninth

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3. Pub. L. No. 50-134, § 3, 25 Stat. 660 (1889).

4. *See, e.g.*, Aaron S. Duck, Note, *Indians: Modern Tribal Jurisdiction Over Non-Indian Parties: The Supreme Court Takes Another Bite Out Of Tribal Sovereignty In Strate v. A-1 Contractors*, 51 Okla. L. Rev. 727 (1998).

Circuit. On the first occasion, BN's Petition was granted to give the Ninth Circuit the opportunity to consider the issues in light of the Court's intervening decision in *Strate*.[5] Red Wolf's Petition should be granted on this second occasion to correct the Ninth Circuit's misapplication of *Strate*.

A. Tribal Court Proceedings.

On November 22, 1993, Beverly Nadine Red Wolf and Regina Ann Bull Tail were killed when a BN train collided with their stalled car at a BN railroad crossing on the Crow Reservation south of Lodge Grass, Montana. The accident occurred at the intersection of a tribal road and the BN right-of-way which had been granted to BN's predecessor by Congress in 1889. In exchange for the right-of-way, the railroad promised, in the granting legislation, that the "operation of such railroad *shall* be conducted with due regard for the rights of the Indians". Pet. App. 45a.

Red Wolf filed a wrongful death action against BN in Crow Tribal Court alleging that the deaths were caused precisely because of BN's breach of its promise and obligation to operate its railroad with such "due regard". BN attempted to prematurely challenge tribal court jurisdiction in federal court, but was rebuffed for failure to exhaust tribal court remedies. Pet. App. 17a.

At trial in tribal court, it was established that the accident occurred on a tribal road within the Crow Reservation. Testimony from witnesses concluded that since the accident was "all tribal" neither the Montana Highway Patrol nor Big Horn County law enforcement officials had any jurisdiction

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5. *See* n. 1.

or investigative responsibilities. The Crow Tribe was the only governmental entity which exercised any jurisdiction or regulatory control over the road and its intersection with the railroad right-of-way.[6]

After a verdict in favor of Red Wolf, BN refused to post an appeal bond in accordance with tribal law and, instead, sought and obtained a federal district court preliminary injunction against execution or enforcement of the Judgment. On Red Wolf's appeal, the Ninth Circuit held that the district court could not intervene prior to exhaustion of tribal court remedies. *See Burlington Northern Railroad Co. v. Red Wolf,* 106 F.3d 868 (9th Cir. 1997). BN then sought a Writ of Certiorari to this court.

Meanwhile, the Crow Tribal Courts were simultaneously considering the merits of BN's appeal of the Judgment, including the issue of tribal court jurisdiction. These parallel proceedings produced a "procedural nightmare" which this court had sought to avoid by creation of the exhaustion of tribal court remedies doctrine in *National Farmers Union.*

At the same time BN was attempting to bypass tribal court proceedings in the federal courts, the Crow Court of Appeals ordered the parties, in their appellate briefs, to address the implications of *Strate* and to supplement the record in order to facilitate the Crow Court's jurisdictional inquiry in light of *Strate*. Pet. App. 39a-40a. In the process, the Crow Court acknowledged facts from the trial record establishing that the accident occurred on a tribal road. Pet. App. 32a. The Crow Court also took judicial notice of facts

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6. Red Wolf's Petition For Panel Rehearing, Appendix, Exs. A and B.

tending to justify application of either of the two *Montana* exceptions. Pet. App. 32a.

Because of subsequent federal court determinations, however, the Crow Court of Appeals was never given the opportunity to make a jurisdictional determination in the first instance in light of *Strate*.

B. Federal Court Proceedings.

On October 6, 1997, this Court granted BN's Petition for Writ of Certiorari, vacated the Ninth Circuit's Judgment, and remanded to the Ninth Circuit for further consideration in light of *Strate*. The Ninth Circuit postponed such further consideration and, instead, remanded directly to the district court. The district court allowed BN to amend its Complaint to directly attack tribal court jurisdiction in federal court without first requiring BN to exhaust the simultaneously pending tribal court proceedings on the jurisdictional issue.

Red Wolf filed a Motion To Dismiss BN's Amended Complaint arguing the need for exhaustion and the existence of tribal court jurisdiction. In support, the federal district court was advised of the situs of the accident on a tribal road and the Crow Appeal Court's findings of fact supporting application of either of the two *Montana* exceptions.[7]

Despite these facts establishing the existence of tribal court jurisdiction, the district court granted BN's Motion For Summary Judgment, permanently enjoined any proceedings

7. Red Wolf also demanded trial by jury on all of the disputed factual issues concerning tribal court jurisdiction raised by BN's Amended Complaint. CR 74. (Citations to "CR __" are to the clerk's record on appeal.)

in tribal court and ruled that since tribal court jurisdiction was plainly lacking, tribal court exhaustion was unnecessary. On appeal, the Ninth Circuit affirmed and this Petition timely followed.

REASONS FOR GRANTING THE WRIT

I.

THE OCCURRENCE OF THE ACCIDENT ON A TRIBAL ROAD ESTABLISHES TRIBAL COURT JURISDICTION UNDER *STRATE*.

The logical converse of the main rule established in *Montana v. United States*, 450 U.S. 544 (1981) is that Indian Tribes retain civil adjudicatory authority over non-Indian activities on Indian owned reservation lands which have not been "alienated". Indeed, in *Strate*, the court readily agreed with *Montana* "that tribes retain considerable control over non-member conduct on tribal land". *Id.* 520 U.S. at 454. While *Strate* significantly confused the issue by injecting the ambiguous idea of "equivalent" or "deemed" alienation, the court left intact the adjudicatory authority of tribes over accidents occurring on tribal roads within a reservation.[8]

The record below is undisputed that the deceased tribal members were traveling on a tribal road within the Crow Reservation at the time their vehicle was struck by the BN train. Although the accident likewise occurred within the

8. Traditionally, "alienation" has had a technical legal meaning requiring complete, voluntary transfer of *title*, which does not normally occur by grant of an easement or right-of-way. *See Properties Inv. v. Found. For Airborne R.*, 563 P.2d 307 (Ariz. App. 1977).

confines of the 150 foot right-of-way granted to BN's predecessor by Congress in 1889, there is no question that the land encompassing both the railroad right-of-way and the tribal road is and always has been owned in fee simple absolute title by the Crow Tribe.[9]

The fact that the site of the accident was tribally owned prevented state and county authorities from exercising any jurisdiction or authority over the accident investigation. As the governing road authority, the Tribe also had jurisdiction and responsibility for ensuring that the railroad crossing itself was in safe condition for users of the tribal road.

The Ninth Circuit held that, despite these undisputed facts, and regardless of the intersecting tribal road, the district court properly granted Summary Judgment that the property where the accident occurred was "deemed" to have been "alienated" to non-Indians and that, therefore, the land was "equivalent" to alienated, non-Indian land.

The Ninth Circuit's conclusion is incorrect. *Strate* excluded tribal roads from the ambiguous "equivalency" analysis for the very reasons that exist here. The Crow Tribe retained exclusive regulatory jurisdiction, dominion and control over the tribal road where it intersected with the BN right-of-way at the point of the accident.

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9. In *United States v. Soldana*, 246 U.S. 530 (1918), the court held that a station platform on the subject railroad right-of-way was "Indian Country" because of the Crow Tribe's ownership of title: "It is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way". *Id.* at 532-33.

If a tribe's legislative or regulatory jurisdiction does not exceed its adjudicatory jurisdiction, a tribe's adjudicatory jurisdiction is at least co-extensive with its regulatory jurisdiction. *Strate* at 453. The Crow Tribe has not "alienated" any of its regulatory authority with respect to the tribal road where the accident occurred, let alone any of its ownership of the underlying land.[10]

In *Strate*, the accident occurred on a state highway subject to the state's control and was, therefore, "distinctly non-tribal in nature". *Strate* at 457. By excluding tribal roads from the *Strate* analysis, the court contemplated a different jurisdictional rule for distinctly tribal accidents occurring on tribal roads, regardless of an intersecting railroad right-of-way. The Crow Tribe has a vital interest in assuring the safety of its members who are forced to cross the railroad right-of-way on tribal roads. The Ninth Circuit was mistaken in regarding these factors to be irrelevant to the "jurisdictional calculus".

II.

THE RIGHT-OF-WAY GRANT PROVIDES TRIBAL COURT AUTHORITY TO ENFORCE INDIAN RIGHTS.

When Congress granted a limited right-of-way to BN's predecessor in 1889, it did so only with the proviso that the "operation of such railroad shall be conducted with *due regard* for the *rights* of the Indians", Pub. L. No. 50-134,

10. The Ninth Circuit has previously held that Indian Tribes in Montana have the authority to tax railroad rights-of-way based upon tribes' ownership of fee simple absolute title to the underlying land. *See Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991).

§ 3, 25 Stat. 660 (1889) (emphasis added).[11] Contrary to the Ninth Circuit's finding, therefore, the grant was not a plenary or absolute "defeasance" of Crow interests in the right-of-way. Pet. App. 8a. Congress not only intended the Crow Tribe to retain fee simple absolute title to the right-of-way, it also meant to emphasize and protect Indian *rights* associated with the right-of-way.[12]

Under these circumstances, the Ninth Circuit could not have been more incorrect when it attempted to equate the highway right-of-way in *Strate* with the railroad right-of-way here. Whereas in *Strate*, Congress utilized its plenary power to strip the tribe of virtually all rights to the highway right-of-way, Congress accomplished the opposite with regard to the railroad right-of-way in this case.[13]

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11. The original version of the grant did not contain the word "due", which was later inserted by amendment into the final version. H.R. Rep. No. 3825, 50th Cong., 2d Sess. (1889) (Pet. App. 50a).

12. The court in *Soldana* expressed concern that Indian rights could not be protected if the Indians were not given fee simple absolute title to the right-of-way:

> To have excepted this strip from the reservation would have divided it into two; and would have rendered it much more difficult, if not impossible, to afford *that protection to the Indians* which the provisions quoted were designed to insure.

Id. at 533 (emphasis added).

13. The granting instrument in *Strate* reserved to the Indians the right to construct crossings, but only "at their own risk" and with the assumption of "full responsibility" for damage to the right-of-way. *Id.* at 455.

Congress did not, as the Ninth Circuit held, "bestow rights" to the railroad which thereby "limited" the rights of the Crow Tribe. Pet. App. 8a. The rights of the Crow Tribe to the subject right-of-way were specifically protected, enhanced and emphasized by virtue of the addition of the "due regard" language in the right-of-way grant. If anyone's "rights" were diminished or limited by Congress, it was the right of the railroad to operate its trains without answering in tribal court for its negligent failure to exercise "due regard".

The Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601, *et seq.*, establishes tribal courts "as the appropriate forums for the adjudication of disputes affecting personal and property *rights*". 25 U.S.C. § 3601(6) (emphasis added). Pet. App. 47a. The nature of Indian rights at the subject railroad crossing and the extent to which such rights are to be given "due regard" are matters to be determined by the Crow Tribal Courts.

III.

JURISDICTIONAL QUESTIONS OF FACT PENDING IN TRIBAL COURT REQUIRE APPLICATION OF THE EXHAUSTION OF TRIBAL REMEDIES DOCTRINE.

According to the Ninth Circuit, *Strate* eliminated the requirement of exhaustion of tribal court remedies where "tribal courts *plainly* do not have jurisdiction . . . pursuant to *Montana* and *Strate*". Pet. App. 14a, (emphasis added). This ruling has the effect of eliminating the doctrine altogether since federal courts, rather than tribal courts, are

now empowered to decide, in the first instance, whether tribal court jurisdiction is "plainly" lacking.[14]

The Ninth Circuit's interpretation is unworkable, and this case is an enlightening example. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) created the "prudential" rule of exhaustion to give tribal courts the right to determine jurisdiction in the first instance through "detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions". *Id.* at 855-56. Without such a rule, the court envisioned a "procedural nightmare" of competing and inconsistent decisions based upon an incomplete record. *Id.* at 856-57.

The parallel proceedings in tribal court and federal court have produced just such a procedural nightmare in this case. *Strate* was decided when the Crow Court of Appeals was in the process of considering BN's appeal, particularly the issue of tribal court jurisdiction. To facilitate BN's appeal, the Crow Appeals Court ordered the parties to address *Strate* and "supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents". Pet. App. 40a.

The tribal court record developed through this process established that:

> 1. The accident occurred on a tribal road which was not owned or maintained in any way by Big Horn County, Montana, or the state of Montana.

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14. *See* 51 Okla. L. Rev. 727, 745 (1998).

2. From 1984 to 1993, BN killed at least 17 Crow tribal members through its railroad operations.

3. Each time a death occurs on the Crow Reservation, the Crow Tribe is forced to pay a sum up to $3,500.00 for the funeral of the deceased tribal member.

4. Each time the death of a Crow tribal member occurs, the tribe is required to pay other expenses, such as travel, medical expenses, etc.

5. The Crow Tribe's political process operates through tribal councils where tribal members vote. Each time a tribal member is killed, such death has a direct impact on the political integrity of the Crow Tribe, by the loss of a voter and possible councilman.

6. Most Crow tribal members provide considerable assistance to the tribe and other tribal members in the areas of education, babysitting, and other general assistance. With the death of each tribal member, these areas of the health and welfare of the Crow Tribe are directly impacted.

Pet. App. 32a-37a (CR 98). Even if the accident was deemed to have occurred on land governed by *Montana's* main rule, these facts clearly implicated application of either of the two *Montana* exceptions.[15]

While the Crow Court of Appeals was reviewing this record and the obvious factual issues created thereby, the

15. Under *Montana*, a tribe retains inherent civil authority over non-Indian conduct which, "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

federal district court was simultaneously determining that *no* disputed jurisdictional facts existed.[16] At the very least, the record compiled in the tribal courts made it far from "plain" that tribal court jurisdiction did not exist. Under *National Farmers Union*, the tribal court should have been allowed to determine jurisdiction in the first instance.

IV.

TRIBAL CONSENT IS REQUIRED BEFORE AN ALTERNATIVE STATE OR FEDERAL COURT FORUM EXISTS.

In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), a member of the Blackfeet Tribe brought a tribal court action against a non-Indian insurer alleging bad faith insurance practices. In addition to reemphasizing the vitality of the doctrine of exhaustion of tribal court remedies, the court also cited 25 U.S.C. § 1326 for the rule that "tribal consent is now a *prerequisite* to the assumption" of state court jurisdiction over reservation based claims. *Id.* at 13 n. 4 (emphasis added); *Kennerly v. District Court*, 400 U.S. 423 (1971) (tribal consent mandatory).

In the state of Montana, only one of seven Indian Tribes (the Flathead Tribe) has given consent to state court jurisdiction. *See, Milbank Mutual Ins. Co. v. Eagleman*, 705 P.2d 1117 (Mont. 1985). The Crow Tribe has *not* given its consent.[17] Red

16. Red Wolf not only presented these factual issues to the federal court, but also demanded trial by jury on any such factual issues. CR 74.

17. Montana is also not among those states listed in 28 U.S.C. § 1360(a), as having jurisdiction over civil causes of action involving Indians arising out of on-reservation conduct.

Wolf, therefore, has a legitimate concern that without tribal court jurisdiction, there is no alternative forum in which to pursue this case. The Ninth Circuit assumed, without citation to 25 U.S.C. § 1326, that Red Wolf "may find a forum in either state or federal courts, as appropriate". Pet. App. 13a. Without the required tribal consent, however, this may be a hollow assurance.[18]

The Ninth Circuit appears to believe that tribal consent is unnecessary if an Indian *plaintiff* voluntarily elects to proceed in state court.[19] Yet, *Iowa Mutual* involved an Indian plaintiff and still the court noted the need for tribal consent before a state court may exercise jurisdiction over reservation based claims. If the Ninth Circuit's decision is allowed to stand, Red Wolf may be left totally without a remedy for BN's breach of its congressionally mandated obligation to operate its railroad with due regard for the rights of Red Wolf.

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18. If there is no state court jurisdiction, there is also no federal court diversity jurisdiction since a federal court sitting in diversity is only another court of the state and cannot afford recovery if made unavailable by the state. *Guarantee Trust Co. v. York*, 326 U.S. 99 (1945); *Angel v. Bullington*, 330 U.S. 183 (1947).

19. *See Montana v. Gilham*, 133 F.3d 1133, 1139 n. 6 (9th Cir. 1998); *Lambert v. Ryozik*, 886 P.2d 378 (Mont. 1994); *Cf. Anderson v. Engelke*, 954 P.2d 1106 (Mont. 1998) (well-settled that absent Indian consent, state courts lack jurisdiction over reservation actions involving tribal members); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987) (Indian plaintiff in federal court required to exhaust tribal court remedies).

CONCLUSION

Red Wolf's petition should be granted, the Ninth Circuit's decision finding no tribal court jurisdiction should be reversed, and the case remanded for further tribal court proceedings in accordance with this Court's ruling.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED NOVEMBER 17, 1999 AND AMENDED JANUARY 6, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-35502
D.C. No. CV-96-00017-JDS

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Plaintiff-Appellee,

v.

VALERIE RED WOLF; GLADYS RED WOLF; RANDY RED WOLF; DORRIE BULL TAIL; DEWEY BULL TAIL,

Defendants-Appellants.

and

HONORABLE RON ARNESON, Crow Tribal Court, Special Judge,

Defendant,

and

THE CROW TRIBE OF INDIANS,

Defendant-Intervenor.

Appendix A

No. 98-35539
D.C. No. CV-96-00017-JDS

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,

Plaintiff-Appellee,

v.

VALERIE RED WOLF; GLADYS RED WOLF; RANDY RED WOLF;
DORRIE BULL TAIL; DEWEY BULL TAIL; HONORABLE RON
ARNESON, Crow Tribal Court, Special Judge,

Defendants.

THE CROW TRIBE OF INDIANS,

Applicant in Intervention-Appellant.

No. 98-35541
D.C. No. CV-96-00017-JDS

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,

Plaintiff-Appellee,

v.

Appendix A

VALERIE RED WOLF; GLADYS RED WOLF; RANDY RED WOLF; DORRIE BULL TAIL; DEWEY BULL TAIL; HONORABLE RON ARNESON, Crow Tribal Court, Special Judge,

Defendants.

THE CROW TRIBE OF INDIANS,

Applicant in Intervention-Appellant.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 17, 1999 — Bozeman, Montana

Filed November 17, 1999
Amended January 6, 2000

Before: Byron R. White, Associate Justice (Ret.),[1]
Sidney R. Thomas and M. Margaret McKeown,
Circuit Judges.

Opinion by Judge Thomas

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1. The Honorable Byron R. White, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

Appendix A

ORDER

The slip opinion filed in this case on November 17, 1999 is amended as follows:

1. The last paragraph on page 13689, continuing onto page 13690 is deleted and the following inserted in lieu thereof:

> By declaring as to nonmembers, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate* altered the lens through which we view the boundaries of a tribal court's civil adjudication. *See Strate*, 520 U.S. at 453. In examining a tribal court's jurisdictional reach, *Strate* adopted the analysis established in *Montana v. United States*, 450 U.S. 544 (1981). *Montana*'s main rule is that, absent the contrary intervention of treaty or federal law, a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians. *See id.* at 563-65; *see also Montana v. King*, 191 F.3d 1108, 1112-13 (9th Cir. 1999).

2. The citation at the conclusion of the first full paragraph on page 13690 is amended to read: "*See King*, 191 F.3d at 1114."

3. On page 13692, line two, the phrase "the Tribe's authority" is substituted for "its authority."

4. On page 13693, the phrase "the tribe" is amended to read "a tribe" in the first sentence of the first full paragraph and in the penultimate sentence of the paragraph. Following that sentence, the citation to the *King* decision is amended to read "191 F.3d at 1113-14."

5. The slip opinion is amended to capitalize the first letter of the word "tribe" on page 13694, lines eight and eighteen, and on page 13695, line three.

With those amendments, the petition for rehearing is denied.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether a tribal court has civil jurisdiction over a tort claim arising from an accident on a right-of-way granted to a railroad by Congress. We conclude that the tribal court lacks jurisdiction, and affirm the district court's grant of an injunction against further prosecution of the tribal court action.

I

Beverly Nadine Red Wolf and Regina Bull Tail were killed when a Burlington Northern Railroad Company ("Railroad") train car collided with their automobile at a railroad grade crossing south of Lodge Grass, Montana, within the exterior boundaries of the Crow Reservation. The train was traveling along a right-of-way, extending 75 feet

on either side from the center of the tracks, granted to the Railroad's predecessor by Congress in 1889. At the time of the collision, the automobile was on the tracks, well within the Railroad's right-of-way.

The Estates filed a wrongful death action against the Railroad in Crow tribal court, resulting in a verdict of $250,000,000. (By motion of the Estates in tribal court, the judgment was later amended to $25,000,000.) The tribal court denied the Railroad's motion to stay the judgment pending appeal, and ordered the Railroad to post bond in the amount of the judgment. While pursuing relief from the judgment and bond in tribal court appeals, the Railroad also went to federal district court and obtained a preliminary injunction against execution or enforcement of the tribal court judgment.

The Estates appealed the issuance of the preliminary injunction. A panel of this Court reversed the judgment of the district court, holding that the district court could not enjoin tribal court proceedings before tribal remedies had been exhausted. *See Burlington Northern Railroad Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997). The Supreme Court granted the Railroad's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In turn, this Court remanded the case to the district court for reconsideration under *Strate*.

On remand, the district court concluded that exhaustion of tribal remedies was not required under *Strate*. The Railroad subsequently filed an amended complaint seeking a permanent injunction against further tribal court proceedings

for want of jurisdiction. The district court then granted the Railroad's motion for summary judgment, holding that exhaustion was unnecessary and permanently enjoining any further proceedings in tribal court. This timely appeal followed.

II

By declaring as to nonmembers, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,' *Strate* altered the lens through which we view the boundaries of a tribal court's civil adjudication. *See Strate*, 520 U.S. at 453. In examining a tribal court's jurisdictional reach, *Strate* adopted the analysis established in *Montana v. United States*, 450 U.S. 544 (1981). *Montana*'s main rule is that, absent the contrary intervention of treaty or federal law, a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians. *See id.* at 563-65; *see also Montana v. King*, 191 F.3d 1108, 1112-13 (9th Cir. 1999).

The threshold question in this appeal is whether *Montana*'s main rule applies, that is, whether the property rights at issue are such that the land may be deemed "alienated" to non-Indians. In *Strate*, the Supreme Court held that a highway right-of-way acquired by a State over land within the boundaries of an Indian reservation was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 454. We reached the same conclusion as to a federal highway that was built and maintained by the State of Montana. *See Wilson v. Marchington*, 127 F.3d 805, 814 (9th Cir. 1997). In *Wilson*,

we held that *Strate* precluded tribal civil adjudicatory jurisdiction over a suit brought by a tribal member against a non-member arising out of an accident on the highway. *See id.* at 815. Similarly, we recently held that a tribe did not have regulatory or civil adjudicatory jurisdiction over Montana's employment practices for work performed on a state-owned highway right-of-way within reservation boundaries. *See King*, 191 F.3d at 1114.

For the same reasons, a right-of-way granted to a railroad by Congress over reservation land is "equivalent for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 454. Congressional power over tribal lands is plenary. "[A]ll aspects of Indian sovereignty are subject to defeasance by Congress." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). In this case, the congressional right-of-way grant to the Railroad's predecessor in interest was absolute, encompassing a grant "for the construction, operation and maintenance of its railroad, telegraph, and telephone line through the lands set apart for the use of the Crow Indians." Pub. L. No. 50-134, § 1, 25 Stat. 660 (1889). There is no principled distinction to be made between the jurisdictional analysis applicable to a congressionally-granted highway right-of-way and a congressionally-granted railroad right-of-way. In each case, Congress has acted within its plenary power to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land.

The Estates argue that, because the accident occurred at the intersection of a tribal road and the right-of-way, the right-of-way cannot be considered alienated at the accident point. But this fact does not alter the jurisdictional calculus. Under the congressionally-granted right-of-way, the Tribe had no reserved power to exclude the Railroad from the reservation, nor to exercise dominion or control over the right-of-way. As in *Strate*, the Tribe has lost the "right of absolute and exclusive use and occupation" of the right-of-way, regardless of intersecting tribal roads. *Strate*, 520 U.S. at 456 (quoting *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)). Nor does the fact that the Tribe or its members retain title to the affected land distinguish it from the right-of-way at issue in *Strate*. *See* 520 U.S. at 454.

For similar reasons, the Tribe's power to tax the right-of-way does not create civil jurisdiction over non-members arising out of accidents occurring on the right-of-way. The power to tax is not equivalent to the right to exercise civil jurisdiction over tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-142 (1982). Indeed, *Merrion* rejected the theory that a tribe's taxation power was co-extensive with its right to exclude non-members from tribal lands. *See id.* at 142.[2] Thus, because

2. Likewise, in *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 902-903 (9th Cir. 1991), we relied on three grounds to support the taxation power over a railroad right-of-way, none of which distinguishes this case from *Strate* and *Wilson*. First, the tribe had a continuing property interest in the right-of-way, which no longer suffices for civil jurisdiction under *Strate*. Second, the Railroad benefitted from tribal police and fire protection, which similarly benefitted drivers on the highway in *Strate*. Third, taxation remained within the tribe's inherent sovereign powers, which *Strate* held did not include civil jurisdiction over nonmembers.

a tribe's taxation power is broader than its civil adjudicatory jurisdiction over non-members, the Tribe's authority to tax the right-of-way is not dispositive.

The Estates also direct our attention to two statutes that they claim as a federal delegation of tribal jurisdiction over the right-of-way. They cite language in the grant that directs that the "operation of such railroad shall be conducted with due regard for the rights of the Indians," § 3, 25 Stat. 660, and the Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601 et seq., which simply provides assistance for the development of tribal justice systems. Tribal jurisdiction over nonmembers on land subject to *Montana*'s main rule requires express congressional authorization. *See Strate*, 520 U.S. at 445. Neither statute contains it.

In sum, under the *Strate* analysis, a federally-created right-of-way is the functional equivalent of land alienated in fee to non-members. Accordingly, *Montana*'s main rule applies to an accident on a right-of-way granted by Congress to the Railroad's predecessor in interest.

III

The Estates contend that, even if the *Montana* analysis applies, this case falls within the exceptions to the rule. *Montana* recognized two exceptions to the main rule restricting tribal civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians:

> [T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [First, a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Second, a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

The first *Montana* exception applies to non-member consensual relationships with a tribe or its members. The Estates claim that Congress had no power to grant a right-of-way without tribal consent; therefore, they reason, this exception must apply. It is true that Congress allowed the President, in his discretion, to require tribal consent as a condition for granting the right-of-way. *See* § 3, 25 Stat. 660. However, as *Strate*'s application of a similar statute demonstrates, the provision for tribal consent reflected congressional policy, not the limits of congressional power. *See* 520 U.S. at 454 (noting that right-of-way grant required "consent of the proper tribal officials"), citing 25 U.S.C. § 324. A right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing

consensual relationship between a tribe and the grantee. *See King*, 191 F.3d at 1113-14; *Yellowstone County v. Pease*, 96 F.3d 1169, 1176 (9th Cir. 1996). Thus, the first *Montana* exception does not apply.

The second *Montana* exception allows tribal jurisdiction over nonmembers on alienated land when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. However, *Montana*'s second exception "does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989). A nonmember's impact must be "demonstrably serious." *Id.* The Estates claim that deaths of tribal members cause damage to the community by depriving the Tribe of potential councilmembers, teachers and babysitters. However, *Strate* rejected this argument, noting that "if *Montana*'s second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 458. As we stated in *Wilson*, "[i]f the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, [a plaintiff's] status as a tribal member alone cannot." 127 F.3d at 815; *see also County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (holding that a tribe's bare interest in the safety of its members cannot satisfy the second exception). Nor does the Tribe's burial allowance for its members amount to "demonstrably serious" economic consequences. We do not doubt the truth of John Donne's observation that "[n]o man is an island." *Devotions upon Emergent Occasions*, Meditation 17 (1624). This adage

applies with special force in the close, inter-connected tribal culture. However, the Supreme Court has declined to employ this logic in conjunction with the second *Montana* exception. Indeed, it has specifically rejected it. *See Strate*, 520 U.S. at 458-59.

For these reasons, *Montana*'s main rule, rather than its exceptions, applies to this case. In so holding, we do not reduce tribal sovereignty to mere landownership, or equate a servient land estate with political subordination. Rather, we recognize that when Congress provides for the conveyance of certain property rights from tribes to nonmember parties, it acts within its unique authority to defease tribal jurisdiction to the extent its purposes require. *Montana*'s exceptions continue to protect that tribal jurisdiction which is necessary to govern nonmembers' consensual relationships with a tribe or its members, and to protect tribal integrity against serious encroachments by nonmembers. The absence of tribal jurisdiction does not leave the Tribe or its members without redress for nonmembers' alleged wrongs. Tribal plaintiffs may find a forum in either state or federal courts, as appropriate. *See, e.g., Montana v. Gilham*, 133 F.3d 1133, 1139 n.6 (9th Cir. 1998).

IV

The district court correctly concluded that exhaustion of tribal remedies was not required in this instance. As a general rule, a federal district court should abstain from asserting federal question jurisdiction over claims that are identical to claims pending in tribal court until the tribal court

has had a full opportunity to consider the basis for its own jurisdiction. *See Strate*, 520 U.S. at 449-50; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("[C]onsiderations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court."). However, exhaustion is not required where (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, *see Iowa Mut.*, 480 U.S. at 19 n.12; (2) the action is patently violative of express jurisdictional prohibitions, *see id.*; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction, *see id.*; *see also Johnson v. Gila River Indian Community*, 174 F.3d 1032, 1036 (9th Cir. 1999); or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, *see Strate*, 520 U.S. at 459 n.14.

Under the fourth exception, first enunciated in *Strate*, exhaustion is not required when "tribal court jurisdiction does not exist under *Montana* and *Strate*," and remand would only delay a final judgment. *County of Lewis v. Allen*, 163 F.3d 509, 516 (1998). Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court.

V

The right-of-way granted the Railroad by Congress is indistinguishable for analytic purposes from the right-of-way at issue in *Strate*. Accordingly, the tribal courts did not possess civil jurisdiction over a non-member arising out of

an accident occurring within the right-of-way. Because no tribal jurisdiction existed under *Strate*, the Railroad was not required to exhaust tribal remedies. Given this result, it is unnecessary for us to reach the question of whether the district court should have granted the Crow Tribe's motion to intervene. We affirm the judgment of the district court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION DATED AND FILED APRIL 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 96-17-BLG-JDS

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,

Plaintiff,

vs.

ESTATES OF RED WOLF and BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, and DEWEY BULL TAIL,

Defendants.

ORDER

Before the Court are five motions: (1) the motion to dismiss brought by Defendants, the Estates of Red Wolf and Bull Tail, Valerie Red Wolf, Gladys Red Wolf, Randy Red Wolf, Dorrie Bull Tail, and Dewey Bull Tail (the Estates); (2) Crow Tribal Judge Arneson's motion to vacate the Notice of Dismissal filed by Plaintiff Burlington Northern Railroad Company (the Railroad); (3) the motion for summary judgment brought by the Railroad; (4) the motion to intervene

brought by the Crow Tribe; and (5) the motion to respond and for oral argument brought by the Estates. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1332, 2201, 2202.

BACKGROUND

On November 22, 1993, three members of the Crow Tribe were killed when the Railroad's train collided with their automobile at a railroad grade crossing. The collision occurred near Lodge Grass, Montana, within the exterior boundaries of the Crow Reservation. The automobile was struck as the train traveled within the Railroad's 150-foot-wide right-of-way, which was granted to the Railroad's predecessor by Congress in 1889. The Railroad is not a member of the Crow Tribe.

The Estates brought an action against the Railroad in Crow Tribal Court. In November 1994, the Railroad sought relief from that action in this Court. *Burlington Northern Railroad Company v. The Honorable Ronald Arneson*, No. CV 94-156-BLG-JDS. The Court dismissed that case by ruling that the parties must first exhaust their remedies through the tribal court system before seeking relief in federal court. In Crow Tribal Court, a trial was held and a jury awarded to five heirs of the decedents a total of $250 million.

The Railroad brought the present action for a temporary restraining order enjoining the enforcement of the Crow Tribal Court judgment and for a preliminary injunction. On February 28, 1996, the Court preliminarily enjoined Defendants from executing upon or attempting to enforce the judgment entered on February 6, 1996 by the Crow Tribal

Court, in the matter of *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Company*, Civil Case No. 94-31 and stayed further proceedings in this Court pending exhaustion of tribal judicial remedies. The Ninth Circuit Court of Appeals reversed this Court, but the United States Supreme Court vacated the Ninth Circuit's ruling and remanded for reconsideration in light of *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997). On November 13, 1997, the Ninth Circuit remanded the case to this Court for further consideration in light of *Strate*.

On December 2, 1997, the Railroad was afforded leave to amend its complaint, and an Amended Complaint was filed December 8, 1997. The Amended Complaint seeks: (1) a declaration that (a) the Crow court lacks jurisdiction over the subject matter of the action and (b) the amended judgment is void and unenforceable in any state, federal, or tribal court; (2) an injunction permanently enjoining Tribal Court claimants from pursuing any further proceedings against the Railroad arising from the accident in any Crow Court; and (3) an injunction permanently enjoining the Tribal Court claimants from enforcing the Tribal Court judgment in any court.

The record indicates that, as of January 27, 1998, the tribal court action was before the Crow Court of Appeals for its "full decision on subject matter jurisdiction and (if jurisdiction is held to exist) the merits of the appeal." *Estates of Red Wolf v. Burlington Northern Railroad Co.*, No. 97-010, at 5-6 (Crow Ct. App. Jan. 27, 1998) (Order Re: Motion for Stay).

Appendix B

DISCUSSION

Arneson's Motion to Vacate Dismissal

The Railroad filed its Amended Complaint on December 8, 1997. On December 15, 1997, the Railroad filed a Notice of Dismissal under Fed. R. Civ. P. 15(a) and 41(a)(1), dismissing Crow Tribal Court Judge Ron Arneson as a defendant. Arneson objects to the dismissal, asserting that his filing of motions to deny preliminary injunctive relief and for dismissal of the original complaint cut off the Railroad's right to file a unilateral notice of dismissal under Fed. R. Civ. P. 41(a)(1).

Under Fed. R. Civ. P. 15(a), an amended complaint completely displaces the original complaint and "renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference" the original complaint. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); *see also Bullen v. DeBretteville*, 239 F.2d 824, 832 (9th Cir. 1956) ("an amended pleading supersedes the original, the latter being treated as non-existent"). The Railroad's Amended Complaint does not incorporate by reference the original complaint. Thus, Arneson's previous motions to dismiss were mooted by the Railroad's amendment. As a result, the Railroad was able to dismiss Arneson as a defendant as a matter of right under Fed. R. Civ. P. 41(a)(1) because Arneson had not yet answered or moved for summary judgment upon the Amended Complaint.

Appendix B

The Crow Tribe's Motion to Intervene

The Crow Tribe moves to intervene as an interested party under Fed. R. Civ. P. 24. The Tribe asserts that the adjudication of the issues in this case will deeply affect the Tribe's sovereignty, and the Tribe is entitled to intervene as a matter of right. Alternatively, the Tribe requests permissive intervention.

The Crow Tribe would have the right to intervene only:

> (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). The Tribe does not base its motion to intervene on any statute, but rather on the claim of an interest relating to the transaction which is the subject of the action. However, the Crow Tribe admits it "claims no interest in protecting the individual defendants' damage judgment, or in any other aspect of this dispute between BN and the private defendants which does not involve the Tribe's jurisdiction or sovereignty." (Applicant-Intervenor's Reply Br. in Supp. of Mot. to Intervene at 2.) The Crow Tribe has no direct economic stake in this action, and the Tribe itself would not be bound by the judgment of this Court — only the named

parties are bound by the judgment here. The Tribe has not indicated what claim it wishes to bring here or which party it wishes to intervene against. Therefore, the Tribe has no interest cognizable under Fed. R. Civ. P. 24(a) or (b).

Also, the Crow Tribe may not intervene because it lacks standing. A proposed intervenor "must have Article III standing to participate in proceedings before the district court." *City of Cleveland, Ohio v. Nuclear Regulatory Commission*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). This Court must refrain from "adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Tribe has not filed a proposed pleading that is required under Fed. R. Civ. P. 24(c) to specify the claim for which intervention is sought, and the Tribe's generalized concern for its sovereignty alone does not provide standing. Instead, the Tribe's concern is a matter for the United States Congress.

The Estates' Motion to Dismiss and the Railroad's Motion for Summary Judgment

The Railroad moves for summary judgment, asserting that *Strate* controls here. Specifically, the Railroad argues that the tribal court was without jurisdiction because "tribal authority to regulate the conduct of non-members depends upon the tribe's power to exclude non-members from reservation lands . . . . Because the Tribe has lost the power to exclude BN from the right of way, it has also lost the power to regulate BN's conduct." (Pl.'s Reply Br. at 1.) The Estates oppose the motion for summary judgment and move to dismiss, asserting that this case is distinguishable from

Strate and the Crow Tribal Court had jurisdiction. Additionally, the Estates move to dismiss on the ground that the Railroad has not exhausted its tribal court remedies.

In ruling upon a motion for summary judgment, the Court's role is only to consider whether a genuine issue of material fact exists, thus precluding judgment as a matter of law and requiring a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A "genuine issue" exists where a jury could reasonably return a verdict for the non-moving party. *See id.* at 248-52. A "material fact" is a fact which might, under the applicable substantive law, affect the outcome of the case. *See id.* at 248. In assessing the existence of genuine issues of material fact, all reasonable inferences are drawn in favor of the non-moving party. *See id.* at 255.

In *Strate*, the United States Supreme Court held that "tribal courts may not entertain claims against nonmembers arising out of accidents on [alienated fee land or its equivalent], absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." *Strate*, 117 S.Ct. at 1408. The Supreme Court "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* In a recent decision, *Austin's Express, Inc. v. Arneson*, 1998 WL 120241 (D. Mont., Mar. 12, 1998), this Court considered *Strate* and distilled the following rule that is equally applicable here:

> [D]efendants must establish that (1) the right-of-way involved in this case is not equivalent to

> alienated fee land, (2) a federal statute or treaty authorizes the Tribe to govern the conduct of the plaintiffs on the (right-of-way), or (3) one of the exceptions to the general rule identified in *Montana* applies.

Id. at 2 (discussing *Montana v. United States*, 450 U.S. 544 (1981).

The Right-of-Way and its Equivalency to Alienated Fee Land

The Estates assert that the right-of-way here is different from the right-of-way in *Strate*. In *Strate*, the Court aligned the right-of-way, for purposes of determining tribal court jurisdiction, "with land alienated to non-Indians" because the Tribes "retained no gatekeeping right" and could not "assert a landowner's right to occupy and exclude. *Strate*, 117 S.Ct. at 1414 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). The Estates assert that the right-of-way here was granted subject to the right of tribal members to use the right-of-way. However, any such a right to use would not entitle the Tribe to exclude the Railroad from its right-of-way. Thus, the Railroad's right-of-way is equivalent to land alienated to non-Indians. Accordingly, as also found in *Strate*, this case is governed by *Montana*.

The Estates also assert that the road upon which the automobile was traveling was a tribal road. (Def'ts' Statement of Genuine Issues at 2). However, it is not disputed that, at the time of the collision, the automobile was on the Railroad's track, (*See, e.g.*, App. to Pl.'s Combined Memo. in Supp. of Mot. for Summ. J. at 9-11), and this Court finds

that the collision occurred within the Railroad's federally granted right-of-way. Thus, under the rule of *Strate*, the issue of whether the road was a tribal road is not material to this case. *Strate* does not suggest a different rule for incidents occurring at the intersection of federally granted rights-of-way and tribal roads. This Court sees no value in creating such a rule in an already fact-sensitive area of the law, nor is there the factual basis for creating such a rule here.

Federal Statute or Treaty Authorizing the Tribe to Govern

The Estates assert that here, unlike in *Strate*, a federal statute authorizes the Crow Tribe to govern the conduct of the Railroad on the right-of-way. (Reply Br. in Supp. of Def'ts' Mot. to Dismiss at 8-12.) The Estates point to language in the statute granting the right-of-way to the Railroad's predecessor that the Railroad must operate on the right-of-way with "due regard for the rights of Indians and in accordance with such rules and regulations as the Secretary of Interior may make to carry out this provision." (*Id.* at 9 (citing Act of February 12, 1889, 25 Stat. 660)). The Court in *Strate* did not define a standard for determining whether a federal statute authorizes a tribe to govern the conduct of nonmembers. However, in *Montana*, the Court stated that the federal delegation of authority must be express. *See Montana*, 450 U.S. at 564 ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"). The statute here does not expressly authorize the Crow Tribe to govern the conduct of the Railroad through actions entertained by the tribal court

system. *See Strate*, 117 S.Ct. at 1413 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding."). Thus, the Crow tribal courts are without jurisdiction over the conduct of the Railroad on the right-of-way, unless one of the two *Montana* exceptions apply.

The Montana Exceptions

As reiterated in *Strate*, the first exception under *Montana* would allow tribal court jurisdiction regarding "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. (quoted in *Strate*, 117 S.Ct. at 1415). The Estates assert that a consensual relationship exists between the Railroad and the Crow Tribe, based upon the fact that the Railroad "entered into a specific consensual written agreement with the Crow Tribe relating to the construction and operation of the railroad." (Def'ts' Reply Br. in Supp. of Mot. to Dismiss at 17; Def'ts' Statement of Genuine Issues at 5-8.) The Estates refer to the consent by the Tribe that was required, in the discretion of the President, before the right-of-way would accrue to the Railroad's predecessor. *See* Act of February 12, 1889, § 3.

The Court in *Strate* found that "the tortious conduct alleged" by the plaintiff in *Strate* did not "fit" within the first exception. Similarly here, the tortious conduct alleged by the Estates does not fit within the exception. Moreover, the statute granting the right of way does not satisfy

Montana's first exception because the creation of the right-of-way was a unilateral legislative action by Congress. Nor does there exist an ongoing commercial relationship between the Crow Tribe and the Railroad regarding the conduct of railroad operations. The Court does not find that the testimony of Walt Marcich — that he witnessed the Railroad's equipment and personnel in areas off the right-of-way presents any issue of material fact. In sum, the right-of-way statute did not create the type of consensual commercial relationship contemplated under *Montana*'s first exception, and the claim here arose not from a consensual commercial situation but from an alleged tort. *See Strate*, 117 S.Ct. at 1415.

The second *Montana* exception would allow tribal court jurisdiction regarding conduct by nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (quoted in *Strate*, 117 S.Ct. at 1415). The Estates assert that the Railroad's operation has threatened these tribal interests because the Railroad has killed or injured dozens of tribal members. (Answer Br. of Def'ts in Opp. to BN's Mot. for Summ. J. at 2-4; Def'ts' Statement of Genuine Issues at 6-7.) In *Strate*, the Court held that the potential jeopardy to the safety of tribal members created by "those who drove carelessly on a public highway" was insufficient to satisfy *Montana*'s second exception. *Strate*, 117 S.Ct. at 415. This Court finds a similar situation in the facts here. The potential jeopardy to the political integrity, economic security, health, or welfare of the Crow Tribe that is created by the Railroad's conduct is insufficient to satisfy *Montana*'s second exception. *Compare Wilson v.*

Marchington, 127 F.3d 805, 814-15 (9th Cir. 1997) (tribal interest is insufficient in an individual tort action) *with State of Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 1140-41 (9th Cir. 1998) (tribal interest is sufficient where tribal water quality is threatened).

In conclusion, the Estates have raised no genuine issue that the right-of-way involved in this case is not equivalent to alienated fee land. No genuine issue exists that a federal statute or treaty authorizes the Crow Tribe to govern the conduct of the Railroad on the right-of-way. Nor is there a genuine issue that one of the *Montana* exceptions applies. Therefore, the Crow Tribe's court had no jurisdiction to entertain the Estates' claim against the Railroad arising out of this accident.

Exhaustion

In *Strate*, the Supreme Court stated the following:

> When . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. . . . Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay.

Strate, 117 S.Ct. at 1416 n.14. As discussed above, this is a case like *Strate*, in which a nonmember's conduct occurred on land covered by *Montana*'s main rule and no federal grant provides for tribal governance of that conduct. Therefore, exhaustion was not and is not required here.

The Statement of the Railroad's Counsel at the 8/28/96 Hearing

In addition to those already discussed above, the Estates contend that a genuine issue of material fact is raised by the statement of Lynn Slade, one of the Railroad's attorneys, at a hearing in tribal court that "[w]e all agree to this Court's jurisdiction." (Def'ts' Statement of Genuine Issues at 4 (citing Trans. of 8/28/96 Hearing at 81).) The Railroad characterizes the statement as a mistranscription and states that it has "fought the Tribal Court's exercise of jurisdiction at every possible stage, including in tribal court." (Pl.'s Memo. in Resp. to Def'ts' Supp. Pleadings at 11 n.5.) Upon examination of the record and in consideration of the Railroad's consistent position regarding tribal court jurisdiction, the Court finds that Slade's statement does not present a genuine issue of the Railroad's acceptance of tribal court jurisdiction.

Because the present ruling disposes of this case, the Court need not address the Railroad's other grounds for summary judgment, i.e., due process, equal protection, preemption, the non-existence of a cause of action under the right-of-way grant, and the Crow Tribal Court's lack of authority to consider punitive damages.

Appendix B

Alternative Forum

The Estates also assert that summary judgment should be denied because federal preemption precludes them from bringing this action in Montana state court. However, Montana state courts are open to suits by resident tribal member plaintiffs because they are Montana citizens. *See Lambert v. Ryozik*, 886 P.2d 378, 380 (Mont. 1994) ("Montana courts are always open to resident tribal members as plaintiffs."). The Montana state court has jurisdiction of the Estates' claim.

The Estates' Motion to Respond and for Oral Argument

On April 21, 1998, the Estates filed a motion to respond and for oral argument with supporting brief, which indicated the Estates' concern "that so many documents and authorities have been cited and so many briefs filed, that there may be some need to put everything in proper perspective for the Court." (Estates' Mot. to Resp. and for Oral Argument at 2). The motion and brief did not offer any argument on the facts or law of the case. Upon consideration of the motion, the Court declines the offer for additional briefing and oral argument.

Accordingly,

IT IS ORDERED AND DECLARED THAT:

1. The Estates' Motion to Dismiss Plaintiff's Amended Complaint [Doc. No. 62] is **denied;**

2. Arneson's Motion to Vacate Notice of Dismissal [Doc. No. 68] is **denied;**

3. The Railroad's Motion for Summary Judgment [Doc. No. 70] is **granted;**

4. The Crow Tribe's Motion to Intervene as Interested Party [Doc. No. 82] is **denied;**

5. The Estates' Motion to Respond and for Oral Argument [Doc. No 96] is **denied;**

6. The courts of the Crow Tribe lack jurisdiction over the matter captioned *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad, Inc.*, No. 94-31;

7. The Amended Judgment in the courts of the Crow Tribe in the matter captioned *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad, Inc.*, No. 94-31, is void and unenforceable in any state, federal, or tribal court;

8. The Tribal Court claimants and each of them are permanently enjoined from pursuing any further proceedings against the Railroad arising from the accident that took place on November 22, 1993 in any court of the Crow Tribe; and

9. The Tribal Court claimants and each of them are permanently enjoined from enforcing any judgment in the matter captioned *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad, Inc.*, No. 94-31, including, but not limited to, commencing enforcement proceedings in any tribal, state, or federal court.

Appendix B

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE and **DATED** this 30th day of April, 1998.

s/ Jack D. Shanstrom
Chief Judge, U.S. District Court

APPENDIX C — ORDER OF THE CROW COURT OF APPEALS IN AND FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA RE REQUEST FOR JUDICIAL NOTICE DATED APRIL 20, 1998 AND FILED APRIL 22, 1998

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

ORDER RE. REQUEST FOR JUDICIAL NOTICE

NOW Pending before this court are plaintiffs-appellees' Motion to Allow Supplementation of the Record (the "Motion") filed February 3, 1998 pursuant to the court's Final Scheduling Order of January 26, 1998. Plaintiffs-appellees subsequently filed a Request for the Court to take Judicial Notice on February 10, 1998 (the "Request"). The evidence tendered by plaintiffs-appellees is intended to go to the issue of subject matter jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).

Appendix C

Defendant-appellant Burlington Northern Railroad Company ("BN") opposes both requests on various grounds: that some of the items tendered were already admitted as evidence at trial and are already part of the record on appeal; that introduction of some of the items as evidence was previously rejected by the Tribal Court; that some of the facts are disputed or otherwise do not fall within the types of matters for which judicial notice is proper under Rule 201 of the Federal Rules of Evidence; and that appellees' delay in tendering this evidence is not excusable, and admission at this time would deny its due process rights.

BN has also requested this court to vacate the oral argument currently scheduled for April 10, 1998, so that it may have sufficient time in advance of oral argument to prepare its Reply Brief following this court's ruling on the appellees' Motion and Request. The court has previously granted that request.

Rule 11(a) of the Crow Tribal Rules of Civil Procedure provides that the Federal Rules of Evidence, as amended, shall be the rules of evidence applicable to civil actions in the Tribal courts. Thus, Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts in this case. The types of facts eligible for judicial notice under Rule 201 are those which are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Judicial notice is mandatory when the court is presented with a proper request. Under Fed. R. Evid. 201(d), "[a] court

shall take judicial notice if requested by a party and supplied with the necessary information" (emphasis added). To protect due process rights, this requirement is subject to the opposing party's "opportunity to be heard as to the propriety . . . and tenor of the matter noticed." Fed. R. Evid. 201(e).

Rule 201(f) further provides that "[j]udicial notice may be taken at any stage of the proceeding." The Advisory Committee's Note makes it clear that judicial notice may be taken "in the trial court or on appeal." Thus, under Fed. R. Evid. 201, federal appeals courts have taken judicial notice of a variety of public records and reports. *See, e.g., Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1479 n.2, 1480 (9th Cir. 1989) (in takings case, plaintiffs were required to exhaust state remedies based on state court report showing that delays were not so excessive as to make resort to state court system futile); *United States v. Gonzales*, 442 F.2d 698, 708 n.8 (2d Cir. 1971), *cert. denied*, 404 U.S. 845 (1971) (cocaine theft statistics from federal Bureau of Narcotics); and *Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1050 (1986) (census data noticed even in federal habeas review), *cited in Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989). Federal appeals courts have also rejected other types of facts for which judicial notice was requested as being too speculative, or if there was no reason for the matter to have been first raised at the point of appellate review. *See Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 n.17 (9th Cir. 1985) (lost customers); *Knox v. Butler*, *supra* (census data in federal habeas corpus proceeding).

In this case, consideration of the appellees' Motion and Request is warranted by the nature of the issue to which the

evidence pertains, i.e., subject matter jurisdiction, and the procedural history of this case. Subject matter jurisdiction may be raised at any time, by the parties or the court, and may not be waived by the parties. *See Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992). Moreover, the existence and extent of Tribal Court jurisdiction in a case such as this requires a "careful examination of tribal sovereignty," including "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985).

The trial of this case, as well as the Tribal Court's ruling on BN's motion for judgment n.o.v. in 1996, were both completed before the Supreme Court issued its decision in *Strate*. In order to allow this court to fully consider *Strate* while avoiding additional delay that could have resulted from yet another remand, this court in its Revised Order Governing Conduct of Appeal entered June 17, 1997, provided the parties the opportunity to supplement the record with "such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances and right-of-way documents." Order ¶ 2. In accordance with that order, both parties appended qualifying documents to their principal briefs on appeal, which were filed on December 15, 1997 and January 20, 1998, respectively. The parties do not dispute the propriety of admitting those documents to inform the court's jurisdictional inquiry. Thus, BN's objections based on the stage of proceedings and lack of due process are not well founded. However, some of the matters submitted by

appellees are not general knowledge, or are conclusory in tenor, and thus do not fall within the criteria of Fed. R. Evid. 201, as adopted by the Crow Rules of Civil Procedure. Now, therefore,

IT IS HEREBY ORDERED that with regard to plaintiffs-appellees' Motion:

(a) DENIED as moot with respect to Exhibits A, B, C, D, G and J, because these materials are already part of the record before this court on appeal;

(b) DENIED as irrelevant with respect to Exhibit E, because a party or its counsel cannot waive subject matter jurisdiction in any event;

(c) DENIED with respect Exhibits F, H and I, because the Tribal Court previously disallowed Eloise Pease's testimony, and plaintiffs-appellees have not cross-appealed that ruling;

(d) DENIED with respect to factual items (1) and (2) stated on page 7 of plaintiffs-appellees' Motion (funeral allowance and other expenses incurred by Tribe), as not falling within the scope of Fed. R. Evid. 201;

(e) GRANTED with respect to factual items (3) and (4) stated on page 7 of plaintiffs-appellees' Motion because they are within the general knowledge of anyone who has a passing familiarity with the ways of the Crow Tribe.

IT IS FURTHER ORDERED with regard to plaintiffs-appellees' Request:

(f) GRANTED with respect to items (1) and (2) in the Request, and the death certificates of Tribal members or descendants attached as Exhibit A, without prejudice as to whether the deaths resulted from any fault or negligence on the part of the railroad;

(g) DENIED with respect to items (3) and (4) on page 3 of the Request, for the same reasons stated in paragraph (d) above, except that judicial notice of Tribal Council Resolution No. 97-01 tendered with appellees' Reply dated March 30, 1998, is GRANTED;

(h) DENIED with respect to items (5) and (6) stated on page 3 of the Request, as duplicative of the items noticed by paragraph (e) above; and

(i) GRANTED with respect to item (7) of the Request, consisting of the reports of the Commissioner of Indian Affairs attached as Exhibit B to the Request, *provided* that appellees also submit the report for the year 1891 (which is referred to in the 1892 report), or otherwise inform the court if it cannot be provided, on or before April 28, 1998.

DONE AND DATED this 20th day of April, 1998.

s/ Glen Birdinground
Glen Birdinground, Chief Judge

s/ Albert Gros-Ventre
Albert Gros-Ventre, Judge

s/ William C. Watt
William C. Watt, Judge

APPENDIX D — LIMITED REMAND ORDER AND REVISED ORDER OF THE CROW COURT OF APPEALS IN AND FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA GOVERNING CONDUCT OF APPEAL DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

LIMITED REMAND ORDER AND REVISED ORDER GOVERNING CONDUCT OF APPEAL

The parties having filed briefs regarding the procedural questions raised in the Court's Order Governing Conduct of Appeal dated February 6, 1997, the Court issues this revised order which, for convenient reference, replaces the previous order in its entirety. A separate order is being issued concurrently regarding the stay of the amended judgment and the supersedeas bond. Now, therefore,

Appendix D

IT IS HEREBY ORDERED that:

1. This case is REMANDED to the Tribal Court for the limited purpose of entering an amended judgment *nunc pro tunc* (i.e., retroactive to the date the original judgment was entered) in the amount of $5 million per heir, or $25 million total, plus post-judgment interest at ten percent (10%) per annum from February 6, 1996. The Tribal Court's inquiry on remand shall be limited to the sufficiency of the plaintiffs' affidavits consenting to the reduced judgment, which were filed with the Tribal Court during March, 1997, or such other evidence of the plaintiffs' knowing consent that the Tribal Court deems necessary. The judgment shall recite that it is without prejudice to the defendant's right to seek full review of the amended judgment.

IT IS FURTHER ORDERED that:

2. The parties in their appellate briefs shall address any issues they deem pertinent with respect to the Tribal Court's jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997).[1] The

1. Based on our initial reading, Tribal Court jurisdiction in this case is not controlled by the Court's recent decision in *Strate v. A-1 Contractors*. The defendant's ownership and use of its right-of-way differs fundamentally from a motorist's use of a state highway, and has different implications for the exceptions to the Montana test, if that test applies here at all. Moreover, because of the nature of these differences and appellant's long-term and continuing presence on the Reservation, the Tribal Court's assertion of jurisdiction in this case does not require the railroad to defend in an "unfamiliar court." *Id.*, 117 S. Ct. at 1416. We thorefore do not regard this case as one where it is evident that the Tribal Court lacks jurisdiction and the Federal court exhaustion requirement does not apply. *Id.* at 1416 n. 14.

parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents. These materials shall be set forth in a separate appendix annexed to the briefs.

IT IS FURTHER ORDERED that:

3. The official caption of this appeal and the docket number shall remain as they appear in the caption of this order for all appellate proceedings subsequent to the entry of the amended judgment. The Appellant's notice of appeal shall be deemed to be timely filed, without the necessity of filing another notice of appeal.

4. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

5. The record on appeal shall be transmitted promptly *after* the Tribal Court enters the amended judgment. One complete copy of the record, together with the original exhibits, shall be transmitted to the Court of Appeals pursuant to Crow R. App. P. 8(b). Except as listed in below, the record on appeal shall consist of the items listed in Crow R. App. P. 7(a), and the transcripts of the Tribal Court proceedings shall be in written form only.

(a) A copy of the videotape of Hon. Donald Stewart's address to the venire (*see Burlington Northern Railroad Company v. Red Wolf*, 106

F.3d 868, 872 (9th Cir., 1997) (Kleinfeld, J., dissenting), shall be included in the record. No other videotapes shall be included in the record on appeal.

(b) A transcription of the audiotapes of proceedings prior to December 12, 1994 (*see* BN's procedural brief at 11), shall be included in the record, or a statement thereof as provided in Crow R. App. P. 7(b). The appellant shall be responsible for preparing the transcription or statement.

(c) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and the record shall include any such translations submitted prior to the date of transmission.

(d) The costs of transcripts, a certified translation, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid or reimbursed by Appellant upon its receipt of the Clerk of the Tribal Court's statement(s).

(e) The Clerk of the Court of Appeals shall serve a Notice of Transmission of the Record on the parties' counsel.

6. The form and filing times for the parties' appellate briefs shall be as follows:

(a) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(b) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(c) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(d) The form of the parties' briefs should conform generally to Ninth Circuit Rules 28-1 and 28-2 as applicable, except that the maximum length shall be seventy (70) pages for the parties' principal briefs and twenty-five (25) pages for the reply, and references to the record shall be made to page numbers of the Excerpts of the Record; and

(e) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed shall be the same as the number of briefs specified in Crow R. App. P. 9(a).

7. The Court will schedule oral argument by further order.

Appendix D

8. All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX E — Pub. L. No. 50-134, 25 Stat. 660 (1889)

CHAP. 134. — An act granting to the Big Horn Southern Railroad Company a right of way through a part of the Crow Indian Reservation in Montana Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a right of way is hereby granted, as hereinafter set forth, to the Big Horn Southern Railroad Company, a corporation duly organized and existing under the laws of the Territory of Montana, for the construction, operation, and maintenance of its railroad, telegraph, and telephone line through the lands set apart for the use of the Crow Indians, and commonly known as the Crow Indian Reservation, beginning at a point on the Northern Pacific Railroad, in the vicinity of the mouth of the Big Horn River, in Yellowstone County, Montana Territory; thence by the most practicable route up said Big Horn River to or near the mouth of the Little Big Horn River; thence up said Little Big Horn River to or near the mouth of Owl Creek; thence up said creek to and across the southern boundary-line of said reservation.

SEC. 2. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad, as aforesaid; and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to said right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road, except at the

terminus of said road at a point on the Northern Pacific Railroad in the vicinity of the mouth of the Big Horn River, Yellowstone County, Montana, and at such point not to exceed one hundred and sixty acres, or so much thereof as the Secretary of the Interior shall decide to be reasonably necessary for terminal facilities.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and grounds adjacent thereto, as provided in section two, and provide the time and manner for the payment thereof; and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of way shall vest in said railroad company in or to any of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of such railroad shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the President of the United States may, in his discretion, require that the consent of the Indians to said right of way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this act shall accrue to said company.

Appendix E

SEC. 4. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed through that part of said reservation through which it shall be constructed: *Provided*, That the company may mortgage said franchise, together with the rolling stock, for money to construct and complete said road: *And provided further*, That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order through said reservation on said line within two years from the passage of this act, or if the consent of the Indians is required under the terms of the proviso to section three of this act, then within two years from the date when such consent shall be obtained as provided in section three of this act.

SEC. 5. That the said railroad company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railroad company under this act.

SEC. 6. That said railroad company shall have the right to survey and locate its road immediately after the passage of this act.

SEC. 7. That Congress may at any time amend, add to, alter, or repeal this act.

Approved, February 12, 1889.

APPENDIX F — RELEVANT STATUTES

25 U.S.C. § 3601

§ 3601. Findings

The Congress finds and declares that —

(1) there is a government-to-government relationship between the United States and each Indian tribe;

(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act [25 USCS §§ 3601 et seq.];

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act [25 USCS §§ 3601 et seq.].

* * *

25 U.S.C. § 1326

§ 1326. Special election

State jurisdiction acquired pursuant to this title [25 USCS §§ 3621 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

* * * *

APPENDIX G — H.R. Rep. No. 3825, 50th Cong., 2d Sess. (1889)

BIG HORN SOUTHERN RAILROAD COMPANY.

JANUARY 23, 1889. — Committed to the Committee of the Whole House and ordered to be printed.

MR. PEEL, from the Committee on Indian Affairs, submitted the following

REPORT:
[To accompany bill H. R. 12150.]

The Committee on Indian Affairs, to whom was referred House bill 12150, report the same back with amendments, and as amended recommended its passage.

The Big Horn Southern Railroad Company is a corporation duly incorporated under the laws of the Territory of Montana. It is proposed to construct, operate, and maintain a railroad, telegraph, and telephone line from a point near the mouth of the Big Horn River in Yellowstone County, Mont., thence up the Big Horn and Little Horn Rivers and Owl Creek to the southern boundary line of the Crow Indian Reservation, thence by the most practicable route to the mouth of Rock Creek, in Wyoming Territory.

In the construction of this road it becomes necessary to cross the Crow Indian Reservation in a southeasterly direction about 50 miles. There is no other route by which this section of the country can be reached from the west by a railroad. The construction of this road, as your committee are advised, is demanded by the commercial necessities of

the country. Settlements along the proposed line in Wyoming are numerous and growing daily in importance. It will tap a rich agricultural country and furnish the only transportation possible from that section to the West. Aside from these considerations the construction and operation of this road will materially enhance the value of the lands of the Crow Indians, who are now accepting their lands in severalty, and who will have, after all allotments are made, 4,250,000 acres of land in excess of the amount required by them. It will furnish transportation for their products to market, facilitate Government transportation to Fort Custer, and improve the service both to the public and the Government.

The committee unanimously recommended the passage of this bill with the following amendments: Amend section 3 by inserting after the word "way," in line 3, the following: "and grounds adjacent thereto as provided in section 3." Also insert the word "due" after the word "with," in line 17 of said section.

We find that the bill reported is in substance and form as such as have passed at the present and preceding sessions of Congress.

Supreme Court, U.S.
FILED
APR 04 2000
CLERK

(2)

No. 99-1521

IN THE
SUPREME COURT OF THE UNITED STATES

ESTATES OF RED WOLF AND BULL TAIL,
VALERIE RED WOLF, GLADYS RED WOLF,
RANDY RED WOLF, DORRIE BULL TAIL
and DEWEY BULL TAIL,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT CROW TRIBE'S BRIEF IN SUPPORT

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SUPREME COURT, U.S.

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2400

QUESTIONS PRESENTED

1. Whether the Crow Tribal Courts' have jurisdiction over a wrongful death action brought by injured Crow tribal members when the cause of action arises on the Crow Indian Reservation, on a railroad right-of-way which crosses Crow trust land.

2. Whether tribal consent to state court jurisdiction pursuant to Public Law 280, as amended, 25 U.S.C. § 1326, is mandatory before a tribal member may be excluded from seeking redress in tribal court for a reservation-based cause of action.

3. Whether the parties are required to exhaust their tribal court remedies when a civil cause of action involving tribal members arises on the reservation and there is a colorable claim of tribal jurisdiction.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

CITATION OF OPINION BELOW 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE 1

I. THE CROW TREATY 2

II. THE CROW LAW AND ORDER CODE 3

STATEMENT OF THE CASE 8

ARGUMENT 9

I. The Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law in a Way Which conflicts with Prior Decisions of this Court 10

A. Burlington Northern's Right-of-Way Is Not Equivalent to Fee Land 10

B. The Holding in Strate Cannot Be Extended to Civil Actions in Which Tribal Members Are Parties 13

C. The Ninth Circuit's Decision Conflicts with Acts of Congress and Federal Policy 15

D. The Ninth Circuit's Decision Excusing the Parties from Exhausting Their Tribal Court Remedies Conflicts with this Court's Previous Deceisions in National Farmers Union Insurance Co. v. Crow Tribe, and Iowa Mutual Insurance Co. v. La Plante 19

II. This Court Should Grant Certiorari Under Rule 10(a) Because the Ninth Circuit's Decision Conflicts With Decisions of Other Court's Of Appeal . . 22

III. This Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court 25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

A-1 Contractors v. Strate, et al.,
76 F.3d 930 (8th Cir. 1996), *aff'd*,
520 U.S. 438 (1997) 23, 24

Babbitt Ford, Inc. v. Navajo Indian Tribe,
710 F.2d 587 (9th Cir. 1983),
cert. denied, 466 U.S. 926 (1984) 25

Burlington Northern R. Co. v. Red Wolf, et al.,
196 F.3d 1059 (9th Cir. 1999) 1

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 13, 20, 21

Hinshaw v. Mahler,
42 F.3d 1178 (9th Cir. 1994),
cert. denied, 513 U.S. 988 (1994) 25

Iowa Mutual Insurance Co. v. LaPlante,
480 U.S. 9 (1987) . . . . . *passim*

Kennerly v. District Court,
400 U.S. 423 (1971) 18

Kerr-McGee Corp. v. Farley,
115 F.3d 1498 (10th Cir. 1997),
cert. denied, 522 U.S. 1090 (1998) 12, 22

McClanahan v. Arizona Tax Commission,
411 U.S. 164 (1973) 9, 11

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 14, 23, 24

Montana v. Blackfeet Tribe,
471 U.S. 759 (1985) 11

Montana v. U.S. EPA,
137 F.3d 1135 (9th Cir. 1998),
cert. denied, 525 U.S. 921 (1998) 25-26

Montana v. United States,
450 U.S. 544 (1981) 10, 23

National Farmers Union Insurance Co. v. Crow Tribe,
471 U.S. 845 (1985) . . . . . *passim*

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 13-14

Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 10, 11

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) . . . . . *passim*

South Dakota v. Bourland,
508 U.S. 679 (1993) 11

Strate v. A-1 Contractors, et al.,
520 U.S. 438 (1997) . . . . . *passim*

Three Affiliated Tribes v. Wold Engineering,
467 U.S. 138 (1984) 18

U.S. v. Santa Fe Pacific Railroad,
314 U.S. 339 (1941) 10, 11

U.S. v. Soldana,
246 U.S. 530 (1918) 10, 11, 12

Williams v. Lee,
358 U.S. 217 (1959) . . . . . *passim*

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997),
cert. denied, 523 U.S. 1074 (1998) 26

Statutes

25 U.S.C. § 1326 . . . . . i, 18

25 U.S.C. § 3601 16

Crow Treaty of 1868, 15 Stat. 649 (May 7, 1868) . 1, 2, 9

Indian Tribal Justice Act of 1993, § 3601 *et seq.* . . *passim*

Other

Charles F. Wilkinson & John M. Volkman,
Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"–How Long a Time is that?,
63 Cal. L. Rev. 601 (1975) 11

Crow Tribal Law and Order Code 1, 3, 8

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) 17

Felix S. Cohen's Handbook of Federal Indian Law, (1982 Ed.) 24

H.R. REP. No. 205, 103RD CONG. 1ST SESS. (1993) 17

S.REP. NO. 88, 103RD CONG. 1ST SESS. 8 (1993) 16

INTRODUCTION

The Respondent Crow Tribe of Indians files this brief in support of the Petition for Certiorari filed by the Estates of Red Wolf and Bull Tail, et al. (hereinafter referred to as the "Red Wolf Estates").[1] This brief is filed in accordance with the requirements of Supreme Court Rules 12.6 and 24.2.

CITATION OF OPINION BELOW

The opinion of the court of appeals, as amended, is reported and cited as Burlington Northern R. Co. v. Red Wolf, et al., 196 F.3d 1059 (9th Cir. 1999).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE.

In addition to the statutes cited in the Appendix to the Petition for Certiorari filed by the Red Wolf Estates, this case involves sections 1 and 2 of the Crow Treaty of 1868, 15 Stat.

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[1] The Crow Tribe's motion to intervene in the district court action was denied on the same day that the district court entered judgment in favor of Burlington Northern. The Tribe appealed the denial of its motion to intervene, and filed a protective notice of appeal from the district court's judgment on the merits, in accordance with accepted Ninth Circuit practice. The Ninth Circuit consolidated the Crow Tribe's appeals with the Red Wolf estates' appeal.

649 (May 7, 1868), and relevant portions of the Crow Tribal Law and Order Code.

I. THE CROW TREATY

The relevant provisions of Articles 1 and 2 of the Crow treaty of 1868 provide as follows:

> Article 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> . . .
>
> Article 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-

channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 15th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

II. THE CROW LAW AND ORDER CODE

The relevant provisions of the federally authorized and approved Crow Law and Order Code establishing the Crow Tribal Court and Court of Appeals state as follows:

TITLE 3. ESTABLISHMENT OF TRIBAL COURTS AND TRIBAL JURISDICTION

CHAPTER I. ESTABLISHMENT OF CROW TRIBAL COURTS

3-1-101. Crow Tribal Court.

(1) There is hereby established the "Crow Tribal Court."

(2) The Crow Tribal Court shall be a court of general civil and criminal jurisdiction and shall hear appeals from final decisions of:

(a) Tribal administrative bodies.

(b) The "small claims" session of the Crow Tribal Court.

. . .

3-1-103. Crow Court of Appeals.

(1) There is hereby established the "Crow Court of Appeals."

(2) The Crow Court of Appeals shall have original and exclusive jurisdiction to hear all appeals from final judgments

and/or orders of the Crow Tribal Court and the Crow Juvenile Court.

CHAPTER II. JURISDICTION OF CROW TRIBAL COURTS

3-2-201. Policy.

It is the intention of the Crow Tribe of Indians to exercise that jurisdictional authority which has not otherwise been enclosed by acts of the United States Congress and failure to legislate in a particular area shall not be deemed a waiver of that authority. The jurisdiction of the Crow Tribal Courts shall be used to insure due process and equal protection of the law for all persons residing within the exterior and entering the boundaries of the Crow Indian Reservation.

3-2-202. Jurisdiction–Territorial.

The jurisdiction of the Crow Tribal Courts shall extend to any and all lands within the exterior boundaries of the Crow Indian Reservation as the same may exist from time to time including all easements, rights-of-way, and fee patented lands within such boundaries.

3-2-203. Jurisdiction–Personal.

(1) The Crow Tribal Court shall have jurisdiction over all

persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian Reservation, provided that the Court shall not exercise criminal jurisdiction over non-Indians.

(2) For purposes of jurisdiction "persons" shall include individuals, businesses, partnerships, associations, cooperatives, and corporations.

3-2-204. Jurisdiction–Property.

(1) The Crow Tribal Court shall have jurisdiction over all property, real and personal, which is located within the exterior boundaries of the Crow Indian Reservation. Such jurisdiction shall extend to the determination of ownership rights in property, interests in property, and the application of property to the satisfaction of a judgment for which the owner of the property is deemed to be liable.

(2) The jurisdiction of the Crow Tribal Courts shall be limited only by federal law; provided however, that the Crow Tribal

Court shall have jurisdiction to render money judgments against persons, businesses, partnerships, corporations, and cooperative associations who are not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of the defendant's property which is located within the exterior boundaries of the Crow Indian Reservation. Unless the defendant subjects himself to the jurisdiction of the court, any judgment in an action commenced by the attachment of property belonging to a party not personally subject to the jurisdiction of the court may be executed only against the property actually attached.

3-2-205. Jurisdiction-Subject Matter.

The Crow Tribal Courts shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation and over all criminal offenses which are enumerated in Title 8 of the Crow Tribal Code and which are committed within the exterior boundaries of the Crow Indian Reservation.

STATEMENT OF THE CASE

In accordance with Supreme Court Rule 24.2, the Respondent Crow Tribe agrees with Petitioners' Statement of the Case, with the following clarifications.

First, the reservation land upon which the train accident occurred is not owned by the Crow Tribe in fee simple absolute. Instead, the land is tribal land, legal title to which is held in trust by the United States for the benefit of the Crow Tribe. Indian land of this type is commonly referred to as tribal trust land. The train accident which killed members of the Red Wolf and Bull Tail families occurred at the intersection where a tribal road crosses Burlington Northern's railroad tracks, within the 150 foot right-of-way granted by Congress to Burlington Northern's predecessor in interest. Thus, the accident occurred on tribal trust land, not land "owned in fee simple absolute title by the Crow Tribe." (*See* Petition for Certiorari at p. 8.)

Second, the Crow Tribal Law and Order Code, adopted pursuant to federal law and the Crow Tribe's federally approved Constitution, expressly provides for the exercise of civil jurisdiction over an action which occurs on the reservation and results in the death of a tribal member. (Crow Law and Order Code, §§ 3-2-202 - 203, 3-2-205.)

Third, the Crow Indian Reservation, where the train accident occurred, was established by the Treaty of 1868 between the Crow Tribe and the United States. The treaty was a treaty of peace between the Crow Tribe and the United States under which the Tribe relinquished its title to millions of acres of land to the United States. In return, the United States promised that the remaining Crow Reservation would be "set apart for the absolute and undisturbed use and

occupation" of the Crow Indians. (Treaty with the Crows, Articles 1, 2.) Like the Navajo treaty of 1868, Articles 1 and 2 of the Crow treaty reserved to the Crows a portion of their traditional territory. Thus, "[i]n return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." McClanahan v. Arizona Tax Commission, 411 U.S. 164, 174 (1973); quoting Williams v. Lee, 358 U.S. 217, 223 (1959). This Court has held that this treaty language established the reservation "within the exclusive sovereignty of the Tribe under general federal supervision." McClanahan, 411 U.S. at 175; Williams, 358 U.S. at 222-23. The rights which the Crow Tribe reserved under their treaty lie at the heart of this case.

ARGUMENT

This case presents an opportunity for the Court to clarify its holding in Strate v. A-1 Contractors, et al., 520 U.S. 438 (1997), and to harmonize its decision in Strate in order to avoid conflict with its other Indian law decisions, most notably, Williams v. Lee, *supra*. This case also presents the opportunity for the Supreme Court to clarify the continuing vitality of the tribal court exhaustion doctrine first enunciated in National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985). This Court should grant the Petition for Certiorari because the Ninth Circuit's interpretation of Strate conflicts not only with other federal courts of appeals, but with controlling decisions of this Court. Moreover, the Ninth Circuit decision divests the tribal court of jurisdiction over actions which involve injured tribal members, an important question of federal law that has not been, but should be, settled by this Court. Review on a

Petition for Certiorari is therefore appropriate under Supreme Court Rule 10(a) and (c).

I. The Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law in a Way Which Conflicts with Prior Decisions of this Court.

Relying on Strate, the Ninth Circuit held that the Crow tribal courts do not have jurisdiction to adjudicate the Red Wolf Estates' action against Burlington Northern because the railroad right-of-way within which the accident occurred was the equivalent of fee land under Strate, such that the main rule in Montana v. United States, 450 U.S. 544 (1981), applied. 196. F.3d at 1063. The Ninth Circuit then analyzed the two Montana exceptions to the main rule, and held that neither exception justified the exercise of tribal court jurisdiction. *Id.* at 1064-65. The Ninth Circuit's decision not only misconstrues Strate and Montana, it construes Strate in a way which brings it into direct conflict with other decisions of this Court.

A. Burlington Northern's Right-of-way Is Not Equivalent to Fee Land.

First, the Ninth Circuit's holding that Burlington Northern's right-of-way was the equivalent to fee land under this Court's analysis in Strate conflicts with the Court's earlier decisions in Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985), U.S. v. Soldana, 246 U.S. 530 (1918), and U.S. v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). This Court has consistently held that, because of the unique trust relationship between the United States and Indian tribes, congressional intent to extinguish Indian property or treaty rights must be "plain and unambiguous" and "will not be

lightly implied." Oneida, 470 U.S. at 247-48; Santa Fe Pacific, 314 U.S. at 346, 354; South Dakota v. Bourland, 508 U.S. 679, 687 (1993).[2] In Soldana, this Court held that the exact same right-of-way at issue in the case below did not extinguish the Crow Tribe's title and underlying property interest. 246 U.S. at 532-33. In Santa Fe, this Court held that the extinguishment of Indian title to their land is a matter over which Congress, not the courts, has supreme power. 314 U.S. at 347; *accord*, Oneida, 470 U.S. at 233-34.

Nothing in the congressional statute which granted Burlington Northern a right-of-way across the Crow Reservation indicates that it was intended to affect the Crow's underlying property interest in any way, shape or form. On the contrary, two sections of the statute granting the right-of-way support the opposite proposition, that Congress intended to protect the Tribe's underlying interest in the land over which the railroad was to be constructed. Section 3 of the Act provided that the construction and operation of the railroad "shall be conducted with due regard for the rights of the Indians. . . ." Section 5 of the Act declared that the grant of the right-of-way was on the condition that the railroad "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian

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[2] There are a number of historical and moral reasons why the canons of construction employed by this Court require Indian treaties to be interpreted in favor of Indian Tribes. *See e.g.*, McClanahan, 411 U.S. at 174-175; Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); *see also*, Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"-How Long a Time is that?*, 63 Cal. L. Rev. 601, 610-17 (1975).

tribes any further grant of land or its occupancy than is hereinabove provided." Both of these sections were relied upon by this Court in Soldana to conclude that the congressional grant of a railroad right-of-way across the reservation did not affect the Crow Tribe's property rights. Soldana, 246 U.S. at 532.

Nothing in Strate even suggests that its holding is so broad as to encompass railroad or other commercial rights-of-way which cross Indian reservation land. The key factors in Strate which led the Court to conclude that the state highway was the equivalent of fee land were that the right-of-way was granted to the state, open to the public, traffic on the highway was subject to state control, and the tribe reserved no "gatekeeping" right. Strate, 520 U.S. at 454; *see* Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1506 n.4 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998). The right-of-way at issue in this case is markedly different. There is no grant of any interest to the state of Montana. Burlington Northern's right-of-way is not open to the public, and maintenance and operation of the right-of-way is not subject to state control. Furthermore, both Congress and the Crow Tribe reserved important rights as conditions to the maintenance and operation of the right-of-way by the railroad. Those conditions, set forth in sections 3 and 5 of the right-of-way Act cited above, required Burlington Northern to operate the railroad with "due regard for the rights of the Indians" and to respect the "present tenure of the Indians in their land." In short, the factors which led this Court to equate a state highway to alienated fee land are simply not present in this case. The Ninth Circuit's extension of the Strate analysis to apply to a railroad right-of-way conflicts with the Court's other decisions which protect the continuing property interest of Indian tribes notwithstanding the grant of a conditional right-of-way across tribal land.

This Court's recent decision in El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999), supports the proposition that a right-of-way which is not open to the public or granted to the state is not the equivalent of fee land. In El Paso, this Court rejected the argument that Strate foreclosed tribal court jurisdiction over nuclear tort claims arising on tribal land leased to nonmembers. The Court distinguished Strate as a case dealing with "claims against nonmembers arising on state highways, [which] expressed no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. . . . By contrast, the events in question here occurred on tribal lands." 526 U.S. at 483 (citations omitted). Significantly then, the Court recognized that the land remained tribal land even though it was leased to a nonmember. As a practical and legal matter, there is no distinction between a congressionally granted right-of-way to a private entity such as a railroad, and a congressionally authorized lease of tribal land to a non-Indian mining company. The Ninth Circuit's decision to extend the analysis in Strate beyond state highways thus conflicts with this Court's subsequent decision in El Paso. Certiorari should be granted in order to resolve the conflict.

B. The Holding in Strate Cannot Be Extended to Civil Actions in Which Tribal Members Are Parties.

The Ninth Circuit's ultimate conclusion, that tribal courts lack jurisdiction to adjudicate reservation-based tort claims brought by injured tribal members, is an overly broad interpretation of Strate which, if it stands, would bring Strate into conflict with this Court's earlier decisions recognizing that tribal courts have jurisdiction to adjudicate reservation-based civil disputes between tribal members and nonmembers. In particular, the Ninth Circuit's characterization of Strate

conflicts with Williams v. Lee, *supra*; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).

In Williams v. Lee, this Court held that tribal courts, not state courts, have jurisdiction over a dispute between a tribal member and a non-Indian over the collection of a debt on the reservation. Underlying the Court's holding in Williams was the notion that the treaty which created the Navajo Reservation established the reservation within the exclusive sovereignty of the tribe, and that the "treaty embodied 'the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." Williams, 358 U.S. at 221-22 (emphasis added). The Court then clarified that it was "immaterial that the respondent was a non-Indian. He was on the reservation and the transaction with the tribal member took place there." *Id.* at 223. Williams, then, held that exclusive jurisdiction over an on-reservation dispute involving a tribal member and a nonmember was vested in the tribal court, and if this jurisdiction was to be limited, it was for Congress to do so. *Id.*; *accord*, Santa Clara Pueblo, 436 U.S. at 60; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).

The Ninth Circuit should have followed Williams. Nothing in this Court's decision in Strate supports the notion that its holding should be extended to cases which involve injured tribal members. Strate involved a case between two nontribal members arising from a car accident on a state highway. Unlike Williams, no tribal members were parties to the dispute. As the Court in Strate noted, the dispute was "distinctly non-tribal in nature. It arose between two non-Indians involved in a run of the mill highway accident," and

"the Tribes were strangers to the accident." Strate, 520 U.S. at 457. The Ninth Circuit ignored these distinguishing factors, and extended Strate to apply to reservation-based claims brought by injured tribal members, in direct conflict with Williams, Mescalero, and other cases in this Court recognizing tribal authority to adjudicate disputes between tribal members and nonmembers.[3] This Court should grant certiorari to clarify that the ruling in Strate does not apply to reservation-based civil actions brought by injured tribal members.

C. The Ninth Circuit's Decision Conflicts with Acts of Congress and Federal Policy.

Not only does the Ninth Circuit's decision conflict with previous decisions of this Court, it conflicts as well with congressional and executive branch policy which recognizes and upholds tribal sovereignty in general, and strong tribal courts in particular. Congress has recently spoken on the issue of tribal court jurisdiction over non-Indians, and it is the obligation of the judicial branch to respect and defer to congressional policy in this area. Santa Clara, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

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[3] *Accord*, Iowa Mutual, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

In the Indian Tribal Justice Act of 1993, Congress expressly reaffirmed the importance of tribal sovereignty and the role of tribal courts in promoting and preserving tribal sovereignty. 25 U.S.C. § 3601. In particular, Congress expressly stated that tribal courts are "an essential part of tribal governments and serve as important forums for insuring public health and safety and the political integrity of tribal governments," and that tribal courts are "appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. §§ 3601(5)-(6). The legislative history of the Indian Tribal Justice Act clarifies that Congress intended by these sections to reaffirm tribal court jurisdiction over non-Indian defendants whose conduct injures tribal members on the reservation. The Senate Report accompanying the Act states:

> [25 U.S.C. § 3601(6)] was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The language tracks similar language of the Supreme Court in its ruling in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), in which the Court stated that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication for disputes affecting important and personal property interests of both Indians and non-Indians.

Id. at 65.; S.REP. NO. 88, 103RD CONG. 1ST SESS. 8 (1993).

The House Report accompanying the Act also clarified Congress's understanding that Indian tribal courts retain the right to exercise civil jurisdiction within their territory,

including jurisdiction over the activity of non-Indians on reservation land in which the tribes have a significant interest. "Hence, non-Indians may be sued in tribal court." H.R. REP. NO. 205, 103RD CONG. 1ST SESS. at pp. 8-9 (1993).

Congress's policy in this area has been unwavering since the dawn of the self-determination era in the early 1970s. *See, e.g.*, Mescalero Apache, 464 U.S. 334-35 n.17 (and statutes cited); Iowa Mutual, 480 U.S. at 14-15 nn. 5 and 6. Current Executive Branch policy echoes the commitment of Congress:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998) (emphasis added).

The Ninth Circuit's decision below erroneously extends the holding in Strate to apply to actions which directly

involve tribal members and is contrary to federal policy and Congress's findings in the Indian Tribal Justice Act, as shown above. This Court should grant certiorari to resolve the conflict and bring the Ninth Circuit's decision in line with the expressed policy of Congress as stated in the Indian Tribal Justice Act.

The Ninth Circuit's extension of Strate's holding to apply to actions brought by tribal members who are injured as a result of the negligent acts of non-Indians on the reservation is also inconsistent with the 1968 amendment to Public Law 280, 25 U.S.C. § 1326. Under § 1326 Congress expressly required tribal consent (via a secretarial election) as a prerequisite to the exercise of state court jurisdiction over reservation-based actions involving tribal members. 25 U.S.C. § 1326. This Court has held that Pub. L. 280 does not preclude state courts from exercising jurisdiction when a tribe or its member "seeks rather than contests" state court jurisdiction to resolve a dispute between a tribal member and nonmember, because tribal self-government is not impeded in such a case. Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 140, 149-51 (1984). However, § 1326 does indeed prohibit the judiciary from divesting tribal court jurisdiction and requiring a tribal member to seek redress in state court instead of tribal court against his or her will for a reservation-based claim. Before a tribal member can be forced to seek redress in state court, the tribe has to consent to the exercise of state court jurisdiction in accordance with the procedures outlined in § 1326. Kennerly v. District Court, 400 U.S. 423 (1971). Thus, the Ninth Circuit's holding that a tribal member cannot seek relief in tribal court but must instead seek redress in the state courts conflicts with Pub. L. 280, not to mention Williams and this Court's other decisions which have heretofore upheld the jurisdiction of

tribal courts to adjudicate actions between tribal members and nonmembers.

D. The Ninth Circuit's Decision Excusing the Parties from Exhausting Their Tribal Court Remedies Conflicts with this Court's Previous Decisions in National Farmers Union Insurance Co. V. Crow Tribe, and Iowa Mutual Insurance Co. V. La Plante.

The facts of National Farmers, *supra*, are identical in all material respects to this case. National Farmers involved a personal injury action brought by a Crow tribal member against a nontribal member. The cause of action occurred within the Crow Reservation on fee land owned by the Lodge Grass School District. 471 U.S. at 847. Thus, even assuming that the Ninth Circuit's decision to equate Burlington Northern's right-of-way with fee land is correct, the fact remains that this case is factually identical in all material respects to National Farmers. The Ninth Circuit nevertheless interpreted Strate to excuse exhaustion even though Strate did not involve a tribal member who was a party to the law suit. The Ninth Circuit's interpretation of Strate thus directly conflicts with this Court's previous decision in National Farmers. It also conflicts with this Court's later decision in Iowa Mutual, *supra*. Both cases required the parties to exhaust all of their tribal court remedies, including review in the tribal court of appeals, prior to a federal court entertaining the issue of tribal court jurisdiction. Both cases involved parties who were tribal members (Strate did not), and both cases arose within the boundaries of a reservation, either on fee land or on a right-of-way. There is simply no way to reconcile the Ninth Circuit's decision in this case with

the exhaustion doctrine as it has developed under National Farmers and Iowa Mutual. The Ninth Circuit's interpretation of Strate to divest the Crow Tribal Court of its jurisdiction in this case brings Strate into direct conflict with National Farmers and Iowa Mutual. The Court should accept jurisdiction to resolve this conflict and clarify what, if anything, remains of the exhaustion doctrine first announced in National Farmers.

This Court's recent decision in El Paso Natural Gas, *supra*, supports the notion that the Ninth Circuit should have required the parties to exhaust their tribal court remedies in this case. The Court explained the rationale underlying the exhaustion doctrine in El Paso:

> [National Farmers] was a suit involving the federal question jurisdiction of the United States district court under 28 U.S.C. § 1331, brought to determine whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians. We held, initially, that federal courts have authority to determine, as a matter arising under federal law, whether a tribal court has exceeded the limits of its jurisdiction. After concluding that federal courts have subject matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand until after the tribal court has had a full opportunity to determine its own jurisdiction. In justification of a prudential requirement of tribal exhaustion, we stated that the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that

> sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative and judicial decisions. The same decisions of comity [in Iowa Mutual] provided the rationale for extending the doctrine to cases where a defendant in tribal court asserts federal diversity jurisdiction in a related action in district court. Exhaustion was appropriate in each of those cases because Congress is committed to a policy of supporting tribal self-government which favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge.

El Paso, 526 U.S. at 484 (citations and quotations omitted).

Although El Paso held that exhaustion was not required in that particular case, it did so only because of a "unusual preemption provision" of the Price Anderson Act, under which Congress had preempted state and tribal court jurisdiction over nuclear tort claims. 526 U.S. at 584-85. No such congressional act preempting tribal court jurisdiction is at issue in this case. On the contrary, the only congressional statute which arguably is relevant here is the Indian Tribal Justice Act, and that Act expressly supports the existence of tribal court jurisdiction over this case.

A review of the procedural history of this case, as outlined in the Petition for Certiorari, illustrates that it has become the exact procedural nightmare that this Court in National Farmers sought to avoid. This Court should grant

the Petition for Certiorari to resolve the conflict created by the Ninth Circuit between Strate on the one hand, and National Farmers, Iowa Mutual, and El Paso on the other.

II. This Court Should Grant Certiorari Under Rule 10(a) Because the Ninth Circuit's Decision Conflicts With Decisions of Other Court's Of Appeals.

The Ninth Circuit's decision below conflicts with the Tenth Circuit's decision in Kerr-McGee Corp., *supra*. In Kerr-McGee, the Tenth Circuit held that exhaustion of tribal court remedies was required in a case where tribal member plaintiffs sued a nonmember in a reservation-based tort action. In the course of its holding, the Tenth Circuit recognized that strong tribal interests were implicated by the tribal members' claims. The mill that allegedly produced the toxic and radioactive waste was located on the reservation pursuant to a tribal lease, and the alleged victims of the tort were tribal members residing on the reservation. In such cases, the Tenth Circuit noted that the "tribal nexus is strong, as is the interest of the tribe as a sovereign in protecting and vindicating the rights of its residents." More important, the court discussed the implications of Strate and Montana on its holding:

> Even Strate and Montana, cases that curtailed tribal authority over non-Indians, recognized that tribes retain a core sovereign interest in protecting the health and welfare of the tribe such that they may regulate non-Indians on all lands within the reservation. This appears to be such a case.

Kerr-McGee, 115 F.3d at 1508.

By contrast, the Ninth Circuit below was blind to the fact that tribal members who resided on the reservation were victims in this case, and failed to recognize that this factor, a factor not present in Strate, implicates the significant tribal interest in not only protecting the health and welfare of tribal members, but in providing a judicial forum where tribal members can seek redress for their injuries caused as a result of the negligence of non-Indians on the reservation. These are the exact same considerations that underlie the Supreme Court's decision in Williams v. Lee, *supra*.

Moreover, the Ninth Circuit's analysis in this case is in conflict with the Eighth Circuit's *en banc* decision in Strate, which this Court ultimately affirmed. A-1 Contractors v. Strate, et al., 76 F.3d 930 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997). Although the Eighth Circuit held that the tribal court lacked jurisdiction in Strate, the court rested its holding on principles much more consistent with the Supreme Court's other precedent in the area of tribal jurisdiction. The Eighth Circuit recognized that this Court's decision in Montana v. U.S. was seemingly at odds with the Court's other decisions like Williams v. Lee, Iowa Mutual, and Merrion. In its *en banc* decision, the court harmonized the two seemingly conflicting lines of cases:

> Arguably, some of the language from Iowa Mutual, Williams, and Merrion can be viewed in isolation to create tension with Montana. A careful reading of the particular language of those cases, however, indicates that they can and should be read together with Montana to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember,

> but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and by the leading treatise on American Indian law, which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." This well accepted rule controls this case.

76 F.3d at 938-39 *quoting* Felix S. Cohen's Handbook of Federal Indian Law, 342-43 (1982 Ed.).

The *en banc* court went on to conclude that no valid tribal interest existed in A-1 Contractors because the dispute was "exclusively between non-Indians involved in [a] run-of-the-mill [highway] accident" making the dispute "distinctively non-tribal in nature." *Id.* at 940. In affirming, this Court recognized the same principle. 520 U.S. at 457.

The Ninth Circuit's decision below strays far beyond the principles identified by the *en banc* Eighth Circuit decision in A-1 Contractors, principles which were implicitly accepted by this Court in its affirmance. The holding in Strate can not be extended to civil actions brought by injured tribal members. In the latter case, tribal courts presumptively have jurisdiction as Williams, Iowa Mutual, and Merrion all hold. This Court should grant the Petition for Certiorari and harmonize Strate with Williams, Iowa Mutual, Merrion and the numerous other cases decided by this Court which uphold

tribal sovereignty in cases where the interests of the tribe or tribal members are directly implicated.

III. This Court Should Grant the Petition for Certiorari Because the Ninth Circuit Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled by this Court.

As the above discussion illustrates, the Ninth Circuit has extended the holding in Strate to apply to reservation-based civil claims brought by injured tribal members in tribal court. No case in this Court has ever decided that tribal courts lack civil jurisdiction over such cases. Strate only involved a tort action between two nonmembers. Such a case does not implicate any tribal interest because it did not involve tribal members who were killed as a result of the negligent conduct of a non-Indian on the reservation. Prior to Strate, the decisions of this Court and the lower courts were uniform in upholding tribal jurisdiction over actions where tribal members were parties in a dispute against nonmembers.[4] The conflicts which the Court's decision in Strate has created in the lower courts has led to increased litigation where judges, particularly tribal court judges, must decide jurisdictional challenges in nearly every civil case filed by tribal members against nonmembers on the reservation. The courts facing these jurisdictional challenges have in many cases reached different and anomalous results. For example, after Strate the

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[4] *E.g.*, Williams v. Lee; Iowa Mutual; National Farmers; Santa Clara, *supra*; Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 513 U.S. 988 (1994); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

Ninth Circuit has held on the one hand that an Indian tribe retains the power to regulate non-Indian use of water on non-Indian lands within the reservation. Montana v. U.S. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). On the other hand, the Ninth Circuit in the case below, and in at least one other case, has also held that an Indian tribe cannot provide a judicial forum for its own members who are injured or even killed due to the alleged negligence of nonmembers on reservation lands. *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The Supreme Court should grant certiorari to clarify that Strate does not extend to reservation-based claims brought by tribal members who are injured as a result of the allegedly negligent conduct of nonmembers on reservation land.

CONCLUSION

The Respondent Crow Tribe respectfully requests that the Petition for Certiorari be granted, and that the Ninth Circuit's decision divesting the tribal court of its jurisdiction, and holding that exhaustion of tribal court remedies is not required, be reversed.

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No. 99-1521

Supreme Court, U.S.
FILED
APR 14 2000
CLERK

IN THE

Supreme Court of the United States

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL AND DEWEY BULL TAIL,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF BURLINGTON NORTHERN RAILROAD COMPANY

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RULE 29.6 CORPORATE DISCLOSURE

Pursuant to Rule 29.6, respondent states that Burlington Northern Railroad Company, now The Burlington Northern and Santa Fe Railway Company, is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
I. Statement of Relevant Facts	1
II. Procedural History	2
REASONS FOR DENYING THE WRIT	7
I. THE NINTH CIRCUIT'S RULING ON TRIBAL COURT JURISDICTION DOES NOT MERIT FURTHER REVIEW	7
A. The Court of Appeals Followed the General Rule of *Montana and Strate*	8
B The Tribal Road Is Irrelevant In This Case	10
C. The Statutory Issue Presented by the Petition Is Not Worthy of Certiorari	12
II. THE NINTH CIRCUIT'S EXHAUSTION ANALYSIS DOES NOT MERIT FURTHER REVIEW	14
III. PETITIONERS' CLAIM THAT THEY LACK AN ADEQUATE REMEDY IN STATE OR FEDERAL COURT DOES NOT MERIT REVIEW	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (*en banc*) 16
Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999) 15
Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997) 15
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 8
Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997), *vacated and remanded*, 522 U.S. 801 (1997) 3-4
Burlington Northern R.R. v. Red Wolf, 522 U.S. 801 (1997) 4-5
County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (*en banc*) 7, 11, 16
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 10, 16-17
Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) 16
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 14-15
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) 17
Lambert v. Ryozik, 268 Mont. 219, 886 P.2d 378 (1994) 18
Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998) 18
Montana v. King, 191 F.3d 1108 (9th Cir. 1999) . 7, 11
Montana v. United States, 450 U.S. 544 1981) .... *passim*
National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 14-15
Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 1999) .. 15

TABLE OF AUTHORITIES - Continued

Page

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., No. 99-1828, 2000 U.S. App. LEXIS 5069 (1st Cir. Mar. 22 2000) 15

South Dakota v. Bourland, 508 U.S. 679 (1993) 8, 13

Strate v. A-1 Contractors, 520 U.S. 438 (1997) ... *passim*

Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 18

United States v. Soldana, 246 U.S. 530 (1918) 10

Williams v. Lee, 358 U.S. 217 (1959) 9-10

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) 7, 11, 16, 18

ACTS

Act of February 12, 1889, 25 Stat. 660 ..... 1, 13

STATUTES

25 U.S.C. § 311 12

25 U.S.C. § 1326 17

COUNTERSTATEMENT OF THE CASE

The petition attacks an application of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), to factual circumstances strikingly similar to those at issue in *Strate*. In *Strate*, a tribal court asserted jurisdiction over non-Indian defendants involved in a traffic accident on a state highway. This Court held that the tribal court had no jurisdiction because the federal right-of-way grant for the highway had deprived the Tribes of the power to exclude those nonmembers from the reservation. In this case, the Ninth Circuit held that tribal courts had no jurisdiction over a nonmember railroad because a federally-granted right-of-way had deprived the Crow Tribe of the power to exclude the railroad from the reservation.

This straightforward application of *Strate* does not raise an issue worthy of review. The petition does not demonstrate any conflict between the decision below and even a single decision of any other circuit or state supreme court. It does not show a conflict with an opinion of this Court. Nothing in the petition or in the supporting brief of the Crow Tribe suggests a need for revisiting the unanimous *Strate* decision. Accordingly, the petition should be denied.

I. Statement of Relevant Facts

Respondent Burlington Northern Railroad ("BN") is an interstate rail carrier and is not a member of the Crow Tribe. As a part of its nationwide rail system, it transports freight on a federally-granted right-of-way through the Crow Indian Reservation ("Reservation"). Pet. App. at 5a. The right of way was granted by Congress in 1889. It authorized BN's predecessor-in-interest, the Big Horn Southern Railroad, to construct, operate and maintain a railroad through the Reservation. Act of February 12, 1889, 25 Stat. 660. By statute, the right-of-way extends "seventy-five feet in width on each side of the central line of said railroad." Act § 2, 25 Stat. 660.

In 1993, two members of the Crow Tribe were killed when their automobile was struck by a BN train operating on its right-of-way. The accident occurred within the exterior boundaries of the Reservation at the intersection of BN's right-of-way and a gravel road. *See* Pet. at 7-8. At the time of the accident, the automobile in which the decedents were riding was entirely within BN's 150-foot-wide right-of-way. *Id.*; Pet. App. at 5a-6a. Neither the decedents nor their heirs, who are the petitioners in this case, had any contractual relationships with BN. Nor did the Tribe have a contractual relationship with BN. *See* Pet. App. at 26a.

II. Procedural History

A. The Tribal Court Trial

Shortly after the accident, five heirs of the decedents ("the Red Wolf heirs") filed suit in Crow Tribal Court, seeking compensation for wrongful death and other damages. BN contested tribal jurisdiction from the outset but, in the days before *Strate*, was unsuccessful in obtaining pre-trial relief in either federal or tribal court. *Burlington Northern R.R. v. Arneson*, No. CV94-156-BLG-JDS, Memorandum and Order (D. Mont. Nov. 22, 1994).

In January 1996, trial was conducted in Crow Tribal Court before a jury composed entirely of tribal members. Non-members, who constituted 25% of the population of the reservation, were excluded from the jury. Evidence admitted at trial showed that, at the time of the accident, the 17-year-old driver of the automobile had a blood alcohol level of 0.18 and the driver's mother, one of the passengers, had a blood alcohol level of 0.32 – both well in excess of the legal limit. Nevertheless, after hearing eight days of testimony, the tribal court jury announced its verdict, finding BN 100 percent liable for wrongful

death and awarding $50 million in compensatory damages to each of the five heirs, for a total award of $250 million.[1]

B. *Red Wolf I*

Immediately following entry of judgment, BN asked the tribal court to stay enforcement of the judgment without requiring BN to post a supersedeas bond. The tribal court denied that motion and ordered BN to post bond for the entire amount of the judgment, $250 million, plus interest.

Because this ruling threatened to deprive BN of subsequent federal court review of the tribal court judgment, BN sought immediate relief in the U.S. District Court for the District of Montana. The district court granted BN's motion for a preliminary injunction, preventing enforcement of the tribal court judgment during the pendency of any review proceedings in tribal or federal court. The district court then stayed any further proceedings in federal court pending exhaustion of BN's remedies in tribal court. On appeal, a divided panel of the Ninth Circuit reversed, concluding that BN had not fully exhausted all tribal court remedies. *Red Wolf I*, 106 F.3d at 871.[2]

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[1] The trial had other serious procedural defects. For instance, during jury voir dire, a tribal appellate court judge made a personal appeal to the venire panel, in which he told the panel, "'[b]odies, in the past, bodies are scattered along the railway. Now, this is the day . . . .'" *See Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868, 872 (9th Cir. 1997) (citation omitted) (Kleinfeld, J., dissenting) ("*Red Wolf I*"), *vacated and remanded*, 522 U.S. 801 (1997). This and other infirmities led one federal judge to characterize the trial as falling within the "'wave the bloody shirt' genre." *Id.* at 872 (citation omitted) (Kleinfeld, J., dissenting).

[2] Subsequently, the Red Wolf heirs filed a motion in Crow Tribal Court, unilaterally requesting that the court reduce its previous $250 million judgment to $25 million. The Crow Tribal Court entered an order reducing the judgment to $25 million on August 19, 1997.

C. *Strate v. A-1 Contractors*

While *Red Wolf I* was pending before the Ninth Circuit, this Court granted *certiorari* in *Strate v. A-1 Contractors*. BN filed a brief *amicus curiae* in *Strate*, explaining the circumstances of this case to the Court. BN argued that the Tribes could not exercise adjudicatory authority over the traffic accident in *Strate* because the Tribes did not have the power to exclude nonmembers from the federal right-of-way on which the accident occurred. *See Strate v. A-1 Contractors*, No. 95-1872, Brief of *Amici Curiae* The American Trucking Associations, Inc., The American Automobile Association and Burlington Northern Railroad Company at 11-12 (filed Dec. 1996). The *Red Wolf* proceeding was also discussed at oral argument before this Court in *Strate*.

In a unanimous decision, this Court held that because the Tribes had lost their "gatekeeping right" over the right-of-way, tribal courts could not adjudicate matters arising from the conduct of nonmembers proceeding along the highway. *Strate*, 520 U.S. at 456. In addition, although exhaustion of tribal court remedies was not at issue in *Strate*, the Court nevertheless included a footnote explaining that exhaustion was not required in a case like *Strate*. The Court explained that the exhaustion rule "must give way" where "it is plain that no federal grant provides for tribal governance over nonmembers' conduct on land covered by *Montana*'s main rule." *Id.* at 459-60 n.14.

D. *Red Wolf II*

BN subsequently petitioned this Court for review of the Ninth Circuit's *Red Wolf I* decision in light of *Strate*, arguing that, under *Strate*'s footnote 14, the railroad should be allowed to seek permanent federal relief against the exercise of jurisdiction by the Crow courts without further exhaustion of tribal remedies. The Court granted BN's petition for certiorari, vacated the panel decision and remanded the case to the Ninth Circuit for further consideration in light of *Strate*. *Burlington Northern*

R.R. v. Red Wolf, 522 U.S. 801 (1997). The Ninth Circuit, in turn, remanded the case to the district court "for further consideration in light of *Strate*." *Burlington Northern R.R. v. Red Wolf*, No. 96-35254, Order (9th Cir. Nov. 13, 1997).

On remand, the district court granted BN's motion for summary judgment, holding that the tribal court did not have jurisdiction over claims arising out of the accident. The court concluded that, as in *Strate*, the Crow Tribal Court could not exercise jurisdiction over BN since the accident occurred on BN's federally-granted right-of-way, over which the Tribe "'retained no gatekeeping right.'" Pet. App. at 23a (citation omitted). The court further held that no federal statute expressly authorized the Tribe to exercise jurisdiction over nonmembers. *Id.* at 24a-25a. It also found that this case failed to satisfy either of the exceptions to the general rule against tribal jurisdiction over nonmembers set forth in *Montana v. United States*, 450 U.S. 544 (1981). Pet. App. at 25a-27a. The district court held that tribal court exhaustion was not required under footnote 14 of *Strate*. *Id.* at 27a-28a. Finally, the court denied a motion to intervene filed by the Crow Tribe.

The Red Wolf heirs appealed to the Ninth Circuit. A panel of that Court, comprised of Judges Sidney R. Thomas and Margaret M. McKeown and Justice Byron R. White (sitting by designation), unanimously affirmed. *See* Pet. App. at 1a-15a. Relying on *Strate*, the panel reasoned that the railroad's congressionally granted right-of-way was the equivalent of alienated, non-Indian land. It rejected the argument that petitioners make here – that there would be tribal court jurisdiction if the gravel road on which the decedents were travelling was a tribal road. There was no dispute that the accident occurred entirely within BN's right-of-way. Under these circumstances, the court held that the status of the road on which the decedents were travelling "does not alter the jurisdictional calculus" because "[u]nder the congressionally-granted right-of-way, the Tribe had reserved no

power to exclude the Railroad from the reservation, nor to exercise dominion or control over the right of way." Pet. App. at 9a.

The court also declined plaintiffs' invitation to find that Congress had authorized tribal jurisdiction by directing the railroad to conduct its operations on the right-of-way with "due regard" for the Indian's interests. *Id.* at 10a. "Tribal jurisdiction over nonmembers on land subject to *Montana*'s main rule requires express congressional authorization." *Id.* The "due regard" language in the federal right-of-way statute, the court reasoned, does not constitute such express authorization. *Id.*

The Ninth Circuit rejected plaintiffs' reliance on the two exceptions to *Montana*'s main rule. First, the court concluded that no "consensual relationship" existed between BN and the Tribe as a result of the right-of-way grant. That grant, the court reasoned, was "a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee." *Id.* at 11a-12a. Second, the court held that tribal court jurisdiction was not necessary under *Montana*'s second exception because the interests of injured tribal members could be adequately protected by suits in state and federal court. *Id.* at 13a.

Finally, relying on *Strate*'s footnote 14, the Ninth Circuit agreed with the district court that tribal exhaustion was not required under the circumstances of the case. "Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court." Pet. App. at 14a.

Petitioners subsequently sought rehearing of the panel's decision. Their petition was denied on January 6, 2000. No suggestion for rehearing *en banc* was filed.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S RULING ON TRIBAL COURT JURISDICTION DOES NOT MERIT FURTHER REVIEW

The petition asks this Court to review the Ninth Circuit's conclusion that tribal courts lack civil jurisdiction over a railroad grade-crossing accident on a federally granted right-of-way. This ruling is wholly unremarkable. It is consistent with a long line of Supreme Court decisions, beginning with *Montana v. United States*, 450 U.S. 544, and culminating in *Strate*. It also comports with post-*Strate* jurisprudence among the lower courts. *See, e.g., Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (*en banc*); *Montana v. King*, 191 F.3d 1108 (9th Cir. 1999).

Petitioners do not identify any decision – federal or state, trial or appellate – that is in conflict with the decision of the Ninth Circuit in this case. They do not point to a single judge who has articulated a conflicting viewpoint, on the same or even similar facts. They do not even attempt to make any showing that the federal or state courts are having trouble applying this Court's decision in *Strate*.

On the contrary, their principal complaint seems to be that *Strate* itself is incorrect. Petitioners criticize this Court's *Strate* decision, suggesting that it "significantly confused" the state of the law with respect to tribal jurisdiction over non-Indians and established an "ambiguous" rule. Pet. at 7, 8. However, the unanimous opinion in *Strate* is not ambiguous at all; on the contrary, it represents the logical conclusion of nearly two decades of decisions of this Court.

A. The Court of Appeals Followed the General Rule of *Montana* and *Strate*.

In *Montana*, this Court established a general rule for the exercise of tribal power over non-Indians. Authority "beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. The Court rejected the Crow Tribe's attempt to cast tribal jurisdiction over nonmembers in strict territorial terms, instead concluding that a tribe lacks such power whenever it gives up its right to exclude nonmembers from the reservation. The *Montana* Court held the Tribe could not regulate hunting and fishing by nonmembers on non-Indian fee lands, because the Tribe lacked "the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it . . . ." *Id.* at 554.[3]

The power to exclude continues as the touchstone of tribal jurisdiction over nonmembers in this Court's post-*Montana* decisions. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court emphasized, "[r]egulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11. "Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.* at 689. *See also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 423-24, 444-45 (1989). In *Strate*, the Court held that a tribal court could not exercise jurisdiction over a nonmember with respect to a traffic accident occurring on a federally-granted right-of-way within the reservation, because the Tribes

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[3] The *Montana* Court recognized exceptions to its general rule against tribal jurisdiction for a consensual relationship or where necessary to protect the political integrity, economic security, or health and welfare of the tribe, but found both exceptions inapposite. *Id.* at 565-66.

had given up their right to exclude nonmembers from these trust lands. The right-of-way could therefore be "align[ed] . . with land alienated to non-Indians," such as the fee lands in *Montana*. 520 U.S. at 456.[4]

In this case, the Ninth Circuit did little more than apply these consistent holdings to the closely analogous facts before it. "There is no principled distinction to be made between the jurisdictional analysis applicable to a congressionally-granted highway right-of-way and a congressionally-granted railroad right-of-way. In each case, Congress has acted within its plenary power to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land." Pet. App. at 8a. The petition effectively asks the Court to revisit this well-settled area of law.

The cases cited do not provide a reason to do so. The Crow Tribe suggests a need for this Court to "harmonize its decision in *Strate*" with *Williams v. Lee*, 358 U.S. 217 (1959). But this Court harmonized those two cases in *Strate* itself. *Strate* reasoned that *Montana*, not *Williams*, "is the pathmarking case concerning tribal civil authority over nonmembers." 520 U.S. at 445. Following *Montana*, *Strate* characterized *Williams* as a

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[4] The Crow Tribe points to statements in *Strate* that the highway right-of-way was granted to the State of South Dakota and that it was open to the public. *See* Crow Tribe Br. at 12. These facts were relevant in *Strate* only because the loss of the power to exclude arose from the State's opening of the highway to members of the general public. *See* 520 U.S. at 455-56. Those facts are not relevant where, as here, the non-Indian defendant has obtained directly from Congress a right to pass through the reservation. Indeed, in *Montana* itself, the Court held that the Crow Tribe lacked the power to regulate non-Indians on privately-owned fee lands, which were neither given to a governmental entity nor open to the public. *See Montana*, 450 U.S. at 548, 559.

case "fitting within [*Montana*'s] first exception." *See Strate*, 520 U.S. at 457 (citing *Montana*, 450 U.S. at 565-66).[5]

Nor does *United States v. Soldana*, 246 U.S. 530 (1918), which discussed the Tribe's title to the right-of-way, provide a reason to re-examine *Strate*. BN has not here challenged the tribe's title to the land, but only whether the Tribe can exercise jurisdiction over BN's conduct occurring on that right-of-way. In *Strate*, the Court recognized that the lands at issue belonged to the Tribes, but held that they would be governed by *Montana*'s main rule because the federal right-of-way made them "equivalent, for nonmember governance purposes," to *Montana* land. *See Strate*, 520 U.S. at 454. That holding does not need to be re-examined here.

B. The Tribal Road Is Irrelevant In This Case

Petitioners insist that this case should be accepted for review because the accident occurred at an intersection of BN's right-of-way with a subsequently-constructed tribal road. In *Strate*, this Court reserved (but did not decide) the issue of tribal court jurisdiction over an accident that occurred entirely on a tribal road. *See* 520 U.S. at 442 ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation."). But, as both lower courts recognized, this case does not squarely present the "tribal road" issue.

Rather, as the petitioners have admitted, this case involves an accident that occurred entirely within the bounds of a federal right-of-way. The Ninth Circuit reasoned that the critical inquiry was not whether the deceased tribal members had a right to be where they were at the time of the accident, but rather

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[5] Similarly, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), did not modify the scope of the *Montana* rule. That case involved a commercial lease transaction occurring on tribal land and hence implicated the first *Montana* exception. Here, by contrast, there is no voluntary commercial relationship between BN and the Tribe. Pet. App. at 26a.

whether the Tribe could exclude the non-member railroad from the reservation. Pet. App. at 9a. ("Under the congressionally-granted right-of-way, the Tribe had no reserved power to exclude the Railroad from the reservation . . . ."). This reasoning was consistent with each of the Ninth Circuit's post-*Strate* decisions, including a rare, unanimous *en banc* decision in *County of Lewis v. Allen*, 163 F.3d at 514 (tribe could not exercise jurisdiction over sheriff permitted by federal law to enter reservation). *See also Wilson v. Marchington*, 127 F.3d 805; *Montana v. King*, 191 F.3d 1108. The Ninth Circuit thus properly concluded, "[a]s in *Strate*, the Tribe had lost the 'right of absolute and exclusive use and occupation' of the right-of-way, regardless of intersecting tribal roads." Pet. App. at 9a (citation omitted).[6]

Petitioners also suggest that tribal authority is enhanced here because state and local law enforcement officials lacked authority over the accident investigation. This theory was not timely raised in the courts below.[7] In any event, this argument is neither legally nor factually sound. As a legal matter, the *Strate* Court assumed that tribal police would have some authority "to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state

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[6] The District Court also pointed out that creating a separate jurisdictional rule for intersections of federal rights-of-way with tribal roads would inject confusion into an area previously governed by a bright-line rule. Pet. App. at 24a ("*Strate* does not suggest a different rule for incidents occurring at the intersection of federally granted rights-of-way and tribal roads. This Court sees no value in creating such a rule in an already fact-sensitive area of the law, nor is there the factual basis for creating such a rule here.").

[7] Petitioners did not raise these assertions of fact before the district court. They were not mentioned until oral argument (after merits briefing) in the Court of Appeals. On petition for rehearing, petitioners presented portions of the tribal court transcript that had not been presented in the District Court. Petitioners now improperly seek to rely on these ambiguous excerpts for their arguments about the role of the state police.

officers nonmembers stopped on the highway for conduct violating state law." *Strate*, 520 U.S. at 456 n.11. But that assumption had no bearing on the Court's analysis of tribal court jurisdiction. Furthermore, the record in this case demonstrates that state officials – specifically, a Montana state trooper – did, in fact, investigate the accident at issue. *See* Petition for Panel Rehearing of Appellants at Ex. A (filed Nov. 19, 1999). Contrary to the Petition (at 4), this was not an "all tribal" incident, both because it involved a nonmember of the tribe and because it occurred within a federal right-of-way. [8]

In short, this is not the appropriate case to decide the issue reserved in *Strate* – whether the Tribe might exercise jurisdiction over an accident that occurred wholly on a road over which the Tribe retained the power to exclude a nonmember. This case, instead, turned on a much narrower issue – whether a railroad right-of-way should be treated the same as a highway right-of-way under *Strate*. Following the consistent rationale of *Montana* and *Strate*, the Ninth Circuit correctly held that there was no principled distinction between the two federal rights-of-way. That decision does not warrant review.

C. The Statutory Issue Presented by the Petition Is Not Worthy of Certiorari

Petitioners also ask this Court to review whether certain federal statutory language authorizes tribal jurisdiction. How-

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[8] Indeed, it is not even clear from the record whether the road intersecting BN's right of way is, in fact, a "tribal" road. The road was created upon application of a non-Indian resident pursuant to federal law, which authorizes the Secretary of the Interior to grant rights-of-way for "opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation . . . ." 25 U.S.C. § 311 (1994). *See* Ex. A to Statement of Genuine Issues of Estates of Red Wolf and Bull Tail in Response to BN's Motion for Summary Judgment (D. Mont. filed Feb. 12, 1998). Thus, the gravel road itself appears to rest on a federally granted right-of-way.

ever, the petition overlooks a crucial requirement repeatedly stated in decisions of this Court – that the authorization for the exercise of tribal authority over nonmembers must be *express*. "[A]bsent *express* authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 520 U.S. at 445 (emphasis added). *Accord Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation'") (citation omitted).

As petitioners admitted below, the 1889 Act creating the right-of-way does not contain an express authorization: "[I]n 1889, Congress did not 'expressly' grant authority to the Crow Tribal Courts to adjudicate and enforce Indian rights with respect to the right-of-way . . . ." *Estates of Red Wolf v. Burlington Northern R.R.*, Brief of Appellants Red Wolf *et al.* at 22 (9th Cir.). Indeed, the Red Wolf heirs conceded that "the 'tribal court system' did not even exist in 1889." *Id.* at 21. While the Act expressly refers to the role of the *federal government* in regulating the right of way, *see* Act § 3, 25 Stat. 660 ("in accordance with such rules and regulations as the Secretary of the Interior may make"), it is silent with respect to *tribal* jurisdiction over incidents on the right-of-way. *See* Pet. at 45a.

Nor does the Indian Tribal Justice Support Act provide the requisite express authorization of tribal jurisdiction over nonmembers. That legislation is nothing more than an appropriation of funds to support the establishment of tribal courts. It cannot be read as a blanket grant of adjudicatory power to the tribes. It says nothing about the exercise of tribal jurisdiction over nonmembers. Not surprisingly, then, when the United States offered the Indian Tribal Justice Support Act as a basis for jurisdiction in *Strate*, *see* No. 95-1872, Brief of United States as Amicus Curiae Supporting Petitioners at 3-4, this Court rejected it. *See* 520 U.S. at 456 (petitioners could "refer

to no treaty or statute authorizing [the Tribes] to entertain highway-accident tort suits of the kind" commenced against the nonmember defendants). No further review of this issue is necessary.

II. THE NINTH CIRCUIT'S EXHAUSTION ANALYSIS DOES NOT MERIT FURTHER REVIEW

The petition also seeks review of the Ninth Circuit's ruling on exhaustion of tribal court remedies. However, the petition fails to mention the critical statement in *Strate* on which the Ninth Circuit's holding was predicated. This Court not only decided the issue of tribal court jurisdiction over non-Indians on federal rights-of-way, but also directed that federal courts adhere to that ruling without requiring exhaustion:

> When, as in this case, it is plain that no federal grant provides for tribal governance over nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that the tribal courts lack adjudicatory authority over disputes arising from such conduct . . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

520 U.S. at 459-60 n.14 (citations omitted).

The petition's failure to accept this statement is fatal to its exhaustion argument. For example, petitioners complain that "federal courts, rather than tribal courts, are empowered to decide, in the first instance, whether tribal jurisdiction is 'plainly' lacking." Pet. at 11-12. However, that is exactly the import of this Court's footnote in *Strate*.

Similarly, the Tribe complains of a "direct conflict" between *Strate* and this Court's earlier decisions in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *See* Crow Tribe

Br. at 20. But *Strate* extensively addressed both cases and derived from them an exhaustion rule that was "prudential," rather than "an unyielding requirement." *See* 520 U.S. at 449 n.7, 451-53. The exception recognized in the *Strate* footnote comported with that prudential approach, because it excused compliance where exhaustion would "serve no purpose other than delay." *Id.* at 459-60 n.14.

Petitioners lament "the apparent demise of the doctrine of exhaustion of tribal court remedies." Pet. at 3. But the Ninth Circuit's own exhaustion jurisprudence belies that claim. In a pair of cases decided shortly before oral argument in this case, the Ninth Circuit relied on the prudential exhaustion rule to dismiss actions brought in federal court. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999); *Nevada v. Hicks*, 196 F.3d 1020, 1029-30 (9th Cir. 1999). Other courts of appeals have required exhaustion of tribal remedies in cases decided after *Strate*. *See Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, No. 99-1828, 2000 U.S. App. LEXIS 5069 (1st Cir. Mar. 22, 2000).

Petitioners' principal argument on the merits of the exhaustion question is that the tribal court should have had the opportunity to pass on numerous "facts" of which it had taken judicial notice. But those facts were placed in the record in the federal district court, and neither the district court nor the court of appeals court found them relevant to the jurisdictional calculus. The reason is obvious: *Strate* itself did not find similar facts relevant to its determination of tribal jurisdiction.

For example, *Strate* rejected as a matter of law the argument that the risk of personal injury or the need to provide a forum for such claims could justify jurisdiction over a nonmember. "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s

second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 457-58. The Court reasoned instead that *Montana*'s second exception is implicated only where there is a threat to "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 459 (citation omitted).

In this respect, the *Strate* Court did not adopt the reasoning of the Eighth Circuit *en banc* majority in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (*en banc*), on which the Crow Tribe relies. Crow Tribe Br. at 24. This Court's reasoning requires the same result for a tribal plaintiff as for a nontribal plaintiff. Indeed, *Strate* did not analyze the jurisdictional question based on the identity of the injured plaintiff, but rather on whether the defendant was a member of the tribe. *See Strate*, 520 U.S. at 442 ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.").

Thus, in the wake of *Strate*, courts of appeal have consistently rejected arguments that tribal jurisdiction is necessary to provide a remedy for tort claims, even when asserted by tribal members. *See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998); *County of Lewis*, 163 F.3d at 515; *Wilson*, 127 F.3d at 815. As the U.S. Court of Appeals for the Eighth Circuit has noted, "'[i]f providing a forum for its members would be a sufficient reason to confer subject matter jurisdiction upon the tribal courts when a tribal member is a party to a lawsuit, it follows that the tribal courts would always have civil subject matter jurisdiction over non-Indians.'" *Hornell*, 133 F.3d at 1093 (citation omitted).

Federal courts have had little trouble applying the bright-line test announced in *Strate*'s footnote 14.[9] Thus, there is no reason

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[9] This Court did not detract from footnote 14 when it recognized complete preemption as yet another exception to the exhaustion principle in *El*

to return to the issue and provide further analysis of *Strate*'s exhaustion rule.

III. PETITIONERS' CLAIM THAT THEY LACK AN ADEQUATE REMEDY IN STATE OR FEDERAL COURT DOES NOT MERIT REVIEW

Finally, petitioners ask this Court to consider as an independent ground for *certiorari* the question whether alternative state and federal forums remain open to them. Specifically, petitioners claim that state or federal jurisdiction is foreclosed in this case because the Crow Tribe has not consented to that jurisdiction pursuant to federal law. Pet. at 14-15 (citing 25 U.S.C. § 1326).

Even if that issue had some merit – which it does not – this case would not be the proper vehicle for addressing it. Petitioners have never sought to assert their personal injury claims in either state or federal court. It would make no sense for this Court to consider here the question of whether jurisdiction would be available if and when petitioners choose to do so. Moreover, it is doubtful that this Court would want to consider this question in a context in which the parties who would presumably benefit from state or federal jurisdiction – the petitioners – are actually arguing *against* such jurisdiction.

In any event, the Ninth Circuit correctly concluded that petitioners would have an alternative forum in state or federal court. The federal statute relied upon by petitioners does not serve as an independent bar to state or federal jurisdiction where the tribes lack such jurisdiction in the first instance. It only sets the terms for concurrent state jurisdiction where the tribe already

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Paso. See 526 U.S. 473. Moreover, this Court's decision in *El Paso* eliminates any purported conflict based on *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998), since this Court reversed the parallel decision of the Ninth Circuit (which had followed *Kerr-McGee*) and thereby effectively overruled *Kerr-McGee*.

has jurisdiction. *See Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 150 (1984) ("Nothing in the language or legislative history of Pub. L. No. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction."). The Crow Tribe itself concedes here that the federal statute at issue "does not preclude state courts from exercising jurisdiction when a tribe or its members 'seeks rather than contests' state court jurisdiction to resolve a dispute between a tribal member and nonmember, because tribal self-government is not impeded in such a case." Crow Tribe Br. at 18.

Thus, "[t]his Court . . . repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country." *Wold Eng'g*, 467 U.S. at 148 (citing cases); *Strate*, 520 U.S. at 459 n.14 (where tribal court jurisdiction is lacking, "state or federal courts will be the only forums competent to adjudicate those disputes"). Numerous federal and state courts have applied this principle. *See Wilson*, 127 F.3d at 815; *Montana v. Gilham*, 133 F.3d 1133, 1139 n.6 (9th Cir. 1998) (tribal members have the "'same rights as are accorded any other person'" in state or federal court); *Lambert v. Ryozik*, 268 Mont. 219, 222, 886 P.2d 378, 380 (1994) (Montana courts "have repeatedly affirmed the right of Indian plaintiffs to sue non-Indians in state court as a right guaranteed to all Montana citizens . . . ."). The Ninth Circuit properly rejected petitioners' spurious claim that they lack an alternative forum to hear their claims.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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Supreme Court, U.S.
FILED
APR 21 2000
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No. 99-1521

IN THE

Supreme Court of the United States

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL and DEWEY BULL TAIL,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS RED WOLF AND BULL TAIL

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I. SIGNIFICANCE OF TRIBAL ROAD.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court made a definite point of cautioning lower courts that existing tribal court jurisdiction over accidents occurring on a tribal road within a reservation would not be displaced by the court's ruling. *Id.* at 442. The Ninth Circuit's ruling in this case, is "wholly remarkable" for its complete disregard of that directive.

The facts of this case are far from similar to those in *Strate*. Indeed, as far as Red Wolf is able to determine, this is the first case to come before this Court since *Strate* which involves an accident on a tribal road within a reservation. There could, therefore, hardly be any "conflict" with any other decision.

For BN to argue that Red Wolf's Petition does not raise an issue "worthy of review", necessarily belittles the "worthiness" or wisdom of the Court's effort to limit *Strate* to non-tribal roads. Red Wolf's Petition is a legitimate response to the Court's invitation to clarify the parameters of tribal court jurisdiction in those cases where, as here, tribal members are killed as a result of an accident occurring on a tribal road within a reservation.

Strate did not, contrary to BN, require an accident to occur "wholly" or "entirely" on a tribal road. The Court did not use such limiting terms and it is inappropriate for BN to suggest otherwise. BN emphasizes that the accident occurred entirely within its 150 foot right-of-way. It is just as accurate to say that the deaths occurred entirely on the tribal road. If this case does not "squarely present" the tribal road issue, then no case will. This case is worthy of review so the Court's intent to preserve the tribal road issue will not be rendered meaningless.

BN disputes the factual determinations that the road was a tribal road and that state and local law enforcement officials lacked authority over the accident investigation. BN's argument highlights the problem with the federal courts' disregard for the exhaustion of tribal court remedies doctrine. These issues were pending before the tribal court when the district court was improperly and prematurely allowed to intervene. Indeed, the tribal court of appeals had already taken judicial notice of the occurrence of the accident on a tribal road. It was, however, never given the opportunity to finally determine the "tribal nature" of the accident investigation.

This case merits review for the precise reason that it involves an accident occurring on a tribal road. *Strate* intended to remove such cases from the ambiguous "equivalency" analysis of whether one right-of-way might be similar or different from another type of right-of-way. *Strate* did not create a "one size fits all" right-of-way rule and this case presents the opportunity for the Court to clarify its jurisprudence in this critical area of the law.

II. SIGNIFICANCE OF RIGHT-OF-WAY GRANT.

Strate could not have created a uniform right-of-way rule not only because of the existence of the tribal road exception, but also because every right-of-way is not created equal. When Congress created the railroad right-of-way in this case, it did not divest or "defease" the Crow Indians of their rights. On the contrary, Congress specifically required the operation of the railroad to be conducted with "due regard" for Indian rights. No such granting language existed in *Strate* or any of the other cases relied on by BN.

The congressional language of the right-of-way grant makes it impossible for this right-of-way to be the

"equivalent" of land alienated to non-Indians. This Court held in *United States v. Soldana*, 26 U.S. 530 (1918), that the right-of-way grant did not divest Indian title to the land encompassed within the right-of-way. Congress specifically included the language "due regard for the rights of the Indians" for the express purpose of protecting Indian rights to their land. The Crow Indians did not "alienate" anything by virtue of the right-of-way grant, neither title to the land nor their rights with respect to such land.

The Crow Tribal Courts and the Crow Law and Order Code were established, with the blessing of Congress and the Executive Branch, for the purpose of adjudicating Indian rights. The Indian Tribal Justice Support Act, 25 U.S.C. § 3601, *et seq.*, specifically establishes tribal courts "as the appropriate forums for the adjudication of disputes affecting personal and property *rights*". Combined with the congressional language of the right-of-way grant, these federal acts illustrate the intent that Indian rights adversely affected by railroad operations on the subject right-of-way are to be adjudicated in tribal court. These arguments could not have been considered and rejected in *Strate*, where no such right-of-way language existed.

III. SIGNIFICANCE OF EXHAUSTION DOCTRINE.

Because of the lower courts' disregard of the exhaustion of tribal court remedies doctrine, the Crow Appellate Court was never given the opportunity to review the merits of this case. It is highly inappropriate, under these circumstances, for BN to attempt to poison the perceptions of this Court with allegations of wrongdoing by the deceased tribal members, when such allegations were rejected at trial and have never been examined for accuracy by any reviewing court. By far the worst "procedural defect" in this case has been BN's utter disdain for the legitimacy and competency

of the Crow Tribal Courts, an attitude which has been specifically condemned by this Court. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987).

The fallacy of BN's argument against tribal court exhaustion is that this case is *not* a case "such as" *Strate* where tribal court jurisdiction was "plainly lacking". Taken to its extreme, BN's argument means that tribal court jurisdiction is "plainly lacking" in *any* right-of-way case, regardless of the circumstances. Under BN's analysis, the exhaustion rule, which was meant to be a "prudential" rule in favor of tribal court jurisdiction, would instead become an "unyielding" barrier to such jurisdiction.

BN's citation to other cases requiring exhaustion simply proves the Ninth Circuit's error in this case. In *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), the court emphasized the significance of Indian land ownership to the jurisdictional inquiry. *See also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). The court also emphasized that the *Strate* holding would not apply to an accident occurring on a tribal road within a reservation. *Id.* at 1025. Because the incident in *Hicks* occurred on tribal lands, exhaustion was required. The Ninth Circuit held likewise in *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999).

This case requires tribal court exhaustion for the very reason that tribal court jurisdiction is not plainly lacking. The accident occurred on a tribal road, on Indian owned land, and was caused by the failure of the railroad operating on such land to give due regard to the rights of the Indians as required by Congress. The combination of these factors, mandates tribal court jurisdiction and application of the exhaustion rule.

IV. SIGNIFICANCE OF LACK OF ALTERNATIVE REMEDY.

The question of whether Red Wolf has an alternative forum in state or federal court if tribal court jurisdiction is foreclosed, is anything but settled. BN's arguments prove this very point. The court should grant *certiorari* to resolve this conflicting issue. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *cf. Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984).

V. CONCLUSION.

Red Wolf's Petition should be granted.

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